91-2050

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAY G. BESING AND RAY G. BESING & ASSOCIATES, P.C.,
Petitioners,

v.

SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, P.C.;
M. J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS;
LYNCH, CHAPPEL, ALLDAY AND ALSUP;
AND SMALL, CRAIG & WERKENTHIN
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 22, 1992

QUESTIONS PRESENTED

(1) Whether a prior state court judgment collaterally estopped Petitioners from litigating their standing to invoke 11 U.S.C. § 108(a) to extend the period of limitations governing Petitioners' legal malpractice claims against Respondents.

(2) Whether 11 U.S.C. § 108(a) applied as a matter of law to extend the period of limitations governing Petitioners' legal malpractice claims even though Plaintiffs filed suit on September 19, 1989, after their bankruptcy plan of reorganization was confirmed on June 28, 1989.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are Ray G. Besing, a Dallas lawyer; Ray G. Besing & Associates, P.C., a professional corporation, in Dallas; the law firm of Lynch, Chappel, Allday & Alsup (now Lynch, Chappel & Alsup, a professional corporation) based in Midland, Texas and having an office in Austin, Texas; The Austin, Texas law firm of Small, Craig & Werkenthin, (now Small, Craig & Werkenthin, a professional corporation); Thomas T. Rogers, an Austin lawyer, formerly with the firm of Lynch, Chappel, Allday & Alsup and later with the firm of Small, Craig & Werkenthin; the Dallas law firm of Seeligson, Douglass, Falconer & Vanden Eykel, a professional corporation (now Seeligson & Steinberg, P.C.); M. J. "Ike" Vanden Eykel, a Dallas lawyer with Koons, Fuller, McCurley & Vanden Eykel and formerly with Seeligson, Douglass, Falconer & Vanden Eykel.

None of the above mentioned corporations have parent companies or subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES CITED v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW AND GROUNDS OF JURISDICTION . . 1

STATUTORY AND RULE PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

1. The Fifth Circuit and the U.S. District Court erred in affirming the Bankruptcy Court's Summary Judgment that a prior state court judgment collaterally estopped Petitioners from litigating the applicability of 11 U.S.C. § 108(a) to extend the period of limitations governing Petitioners' legal malpractice claims against Respondents 6

2. Plaintiffs filed suit within the two-year period under 11 U.S.C. § 108(a). Confirmation of the reorganization plan did not affect Petitioners' standing under that statute, and, therefore, Petitioners' were entitled to summary judgment that they had standing to invoke the limitations tolling provisions of 108(a) 9

CONCLUSION 21

TABLE OF CONTENTS (Continued)

APPENDIX (Separate Volume)

A. Opinion and Judgment of the Fifth Circuit Court of Appeals (February 21, 1992)

B. The Court of Appeals' Order Denying Petition for Rehearing (March 24, 1992)

C. U. S. District Court's Order and Judgment (June 27, 1991)

D. U. S. Bankruptcy Court's Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motions for Summary Judgment (October 2, 1990)

E. 11 U.S.C. § 101(12), 108(a), 301, 349, 350, 546(a), 547(b), 548(a), 549, 1101(1), 1107(a), 1112, 1121, 1141(b); 28 USC § 151, 152(a), 1254(1); Bankruptcy Rules 3020(d) and 3022

TABLE OF AUTHORITIES CITED

Cases	Page
Citibank N.A. v. Graphic Scanning Corporation, 618 F.2d 222 (2nd Cir. 1980)	7
In re Chapel Gate Apartments, Ltd., 64 B.R. 569 (Bankr. N.D. Tex. 1986)	12
In re Chernicky Coal Co., Inc., 67 B.R. 828 (Bankr. W.D. Pa. 1986)	14, 17
Cunningham v. Healthco, Inc., 824 F.2d 1448 (5th Cir. 1987)	10, 12, 15
In re Flying S Land & Cattle Co., 71 B.R. 183 (D. Nevada 1987)	9
In re Fortner Oilfield Services, Inc., 49 B.R. 9, 10 (Bankr. N.D. Tex. 1984)	14
In re Hargis, 73 B.R. 622, 625 (Bankr. N.D.Tex. 1987)	12
In re J. E. Jennings, Inc., 46 B.R. 167 (Bankr. E.D. Pa. 1985)	17,21
In re Korvettes, Inc., 42 B.R. 217 (Bankr. S.D.N.Y. 1984)	16
In re Lombard-Wall, Inc., 44 B.R. 928 (S.D.N.Y. 1984)	13
Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986)	6-7
Seawinds, Ltd. v. Nedlloyd Lines, B.V., 80 B.R. 181, 187 (N.D. Cal. 1987)	10, 15
In re Tennessee Wheel & Rubber Co., 64 B.R. 721, 727 (M.D. Tenn. 1986)	10, 14, 17, 18, 20, 21
In re Triangle Chemicals, Inc., 697 F.2d 1280 (5th Cir., 1983)	12
In re Weatherfield Farms, Inc., 34 B.R. 435, 438 (Bankr. D. Vt. 1983)	14

TABLE OF AUTHORITIES CITED (Continued)

Statutes	Page
11 U.S.C. § 101(12)	11
11 U.S.C. § 108(a)	1-22
11 U.S.C. § 301	11
11 U.S.C. § 349	11
11 U.S.C. § 350	11, 14
11 U.S.C. § 546(a)	16
11 U.S.C. § 547(b)	10, 15, 17, 18
11 U.S.C. § 548(a)	10, 15, 17, 18
11 U.S.C. § 549(a)	17
11 U.S.C. § 1101(1)	11
11 U.S.C. § 1107(a)	9
11 U.S.C. § 1112	11
11 U.S.C. § 1121	15
11 U.S.C. § 1141(b)	13, 18, 20
28 U.S.C. § 151	8
28 U.S.C. § 152(a)(1)	8
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1334(a) & (b)	8
Bankruptcy Rules	
Bankruptcy Rule 3020(d)	14
Bankruptcy Rule 3022	16
Other	
Bankruptcy Service, Lawyers' Edition, Ch. 6-10C, § 66	14
Bankruptcy Service, Lawyers' Edition, Ch. 6-10C, § 7B:66	14
Restatement (Second) of Judgments § 28	7, 8

PETITION FOR WRIT OF CERTIORARI

Ray G. Besing and Ray G. Besing & Associates, P.C. respectfully petition that a Writ of Certiorari be issued to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW AND GROUNDS FOR JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit, entered February 21, 1992, is reprinted as Section A of the separate Appendix. The order of the United States Court of Appeals denying Petitioner's Petition for Rehearing was entered on March 24, 1992 and is reprinted as Section B of the separate Appendix. The Order and Judgment of the United States District Court for the Northern District of Texas, Dallas Division, was entered on June 27, 1991, and is reprinted as Section C of the separate Appendix. The Order of the Bankruptcy Court granting the Defendants' (Respondents') Motion for Summary Judgment, entered on October 2, 1990, is reprinted as Section D of the separate Appendix.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

The relevant sections of Title 11 USC and Title 28 USC and the Rules of Bankruptcy Procedure are listed in the Table of Authorities.

STATEMENT OF THE CASE

This appeal involves: (a) the correct construction of § 108(a) of the Bankruptcy Code, a limitations tolling statute; (b) the Bankruptcy Court's error in relying upon the doctrine of collateral estoppel and refusing to construe that statute; and (c) the District Court's and Circuit Court's affirmance of the Bankruptcy Court.

The Petitioners filed Chapter 11 Bankruptcy on March 25, 1988. The Bankruptcy Court entered its order confirming the plan on June 28, 1989. On September 19, 1989, Petitioners sued the Respondent lawyers for legal malpractice in state court. The state court granted the Respondent lawyers' Motions for Summary Judgment on the sole ground of limitations, holding that Petitioners had no standing to invoke the tolling provisions of Bankruptcy Code § 108(a), and the state's two-year statute of limitations had expired. Petitioners then filed an adversary proceeding in Bankruptcy Court seeking a declaratory judgment that they did have standing to invoke § 108(a). The Bankruptcy Court declined to hear the case but, instead, granted Respondents' Motion for Summary Judgment and denied Petitioners' Motion for Summary Judgment on the ground of collateral estoppel, holding that the state court judgment barred the Petitioners from obtaining a declaratory judgment on their standing under 11 U.S.C. § 108(a).

The United States District Court and the Fifth Circuit Court of Appeals affirmed the Bankruptcy Court, and the Petitioners filed this Petition.

Ray G. Besing is a Dallas attorney and the sole shareholder of Ray G. Besing & Associates, P.C. The Respondent lawyers at different times, represented the Petitioners, as Plaintiffs in a suit at various times of litigation against Lyn Noble (now Lyn Noble Hawthorne) and Noble Toyota, Inc. ("Noble") for breach of

contract and damages. Petitioners' malpractice claims against the Respondents arose out of Respondents' acts of negligence during their representation of Petitioners in the underlying "Noble litigation." The relevant chronology is as follows:

In the Spring of 1984, Besing and Noble entered into an agreement to resolve and adjust their respective property rights and joint investments.

In August 1984, Besing filed suit against Noble in the Dallas State Court for breach of the agreement, damage claims and other relief. Subsequently, the case was transferred to the Austin state court, thus involving Dallas and Austin lawyers to represent Besing.

During the course of the Noble litigation (August, 1984 through January, 1984), the Respondents here: (a) did not prepare or file answers for Besing to Noble's requests for admissions and interrogatories; (b) subsequently filed evasive and non-responsive answers to interrogatories and requests for admissions; (c) did not amend defective discovery responses; (d) subsequently agreed to an onerous judgment without authority; and (e) did not obtain a transcribed record of criteria hearings in the trial court. As a result of Respondents' negligence, the trial court in the Noble litigation entirely struck Plaintiff Besing's pleadings and granted a default judgment and summary judgment on Noble's counter-claims, ultimately leading to a judgment on January 25, 1988, for Noble against Besing.

On March 25, 1988, Petitioners filed petitions under Chapter 11 seeking protection from Noble's post-judgment discovery and collection activities. Petitioners' claims against Noble and malpractice claims against the Respondent lawyers were listed as assets in the Bankruptcy schedules. The cases have not been closed. No trustee has ever been appointed.

On June 28, 1989, the Bankruptcy Court confirmed Plaintiffs' Amended Joint Plan of Reorganization. The Plan required Petitioners to pay their unsecured creditors, classes 6 and 6(a), $20,000.00 on the 60th day after confirmation, and periodic $20,000.00 payments thereafter until all the unsecured creditors

are paid in full. After confirmation, Plaintiffs continued their efforts to collect unpaid fees in order to pay their creditors.

On September 19, 1989, the Petitioners filed suit against the Respondents in the state district court in Dallas, seeking damages caused by Respondents' legal malpractice. At that time, Petitioners had barely begun executing the bankruptcy reorganization plan; the bankruptcy cases were not closed (and now are not closed) as provided in § 350 of the Bankruptcy Code; adversary proceedings concerning disputed claims were (and are still) pending; and, the Petitioners were depending on the recovery from this malpractice suit to help pay the creditors under the pay-out terms of the Reorganization Plan. Respondents only pleaded limitations as a defense. The Petitioners relied on § 108(a) of the Bankruptcy Code to extend the state period of limitations for two years after the date of filing bankruptcy, *i.e.*, two years after March 25, 1988. The September, 1989 malpractice suit was filed well within that period.

On May 31, 1990, the state trial court granted Respondents' Motions for Summary Judgment on limitations and dismissed Petitioners' suit with prejudice. The state court accepted Respondents' argument that confirmation of the Petitioners' Plan of Reorganization terminated their status as debtors in possession and, thus, their "trustee" status, so that Petitioners lacked standing to invoke § 108(a). Petitioners perfected an appeal from the state court to the Dallas Court of Appeals. The Dallas Court of Appeals affirmed the state court judgment. Subsequently, Petitioners perfected an appeal to the Texas Supreme Court, which is still pending.

Because of the U.S. Bankruptcy Court's special expertise in applying the Bankruptcy Code, on June 14, 1990, the Petitioners filed their adversary complaint for declaratory judgment in Bankruptcy Court, seeking a determination that Petitioners did have standing to rely on 11 U.S.C. § 108(a) on September 19, 1989, when they filed the state court malpractice action.

However, on October 2, 1990, the Bankruptcy Court denied Petitioners' Motion for Summary Judgment and granted

Respondents' Motion for Summary Judgment holding that, under the doctrine of collateral estoppel, the state court judgment barred Petitioners from seeking a determination that they had standing under § 108(a). The Bankruptcy Court declined to decide the Petitioners' standing under § 108(a).

On June 27, 1991, the District Court affirmed the Bankruptcy Court. On February 21, 1992, the Fifth Circuit Court of Appeals affirmed the Bankruptcy Court and District Court.

REASONS FOR GRANTING THE WRIT

The state court judgment is not entitled to collateral estoppel effect for two reasons: First, the pending state court *appeal* is actually a *de novo* review of a pure question of law, namely, Petitioners' standing under § 108(a); and therefore, the state court judgment is not final. Lacking finality, the state court judgment was not and is not entitled to any collateral estoppel effect. Second, regardless of finality, the bankruptcy law is a unique and specialized body of federal law, jurisdiction of which is committed to the federal courts, which brings this case within a broader exception to collateral estoppel, involving factors relating to the special allocation of jurisdiction.

With regard to the Petitioners' standing under § 108(a), it is inappropriate to resolve the standing issue by determining whether or not the Petitioners were still debtors in possession at the time they filed the state court malpractice suit, because there is *no* distinction between a debtor and a debtor in possession in a Chapter 11 case, where no trustee has been appointed.

Second, even if the debtor/debtor in possession distinction is valid, confirmation of Petitioners' reorganization plan did *not* terminate their status as debtors in possession.

Third, even if Petitioners were no longer debtors in possession on September 19, 1989, it should not matter. The underlying purpose of § 108(a), in a Chapter 11 case without a trustee, is to afford the Petitioners a full two-year "breathing spell" in which to evaluate and commence litigation. Making one's § 108(a) standing turn on his continued status as "debtor in possession,"

which may terminate long before the expiration of the two-year extension (if confirmation so causes), arbitrarily and prematurely deprives him and his creditors of the essential benefits of the statute, and confers a windfall on potential defendants, who should reasonably anticipate being sued for up to two full years following the date of the filing of a petition in bankruptcy. Such a narrow construction of § 108(a) is incongruous with well-established treatment of other parallel provisions of the Bankruptcy Code.

ARGUMENT

ISSUE NO. 1

COLLATERAL ESTOPPEL

A. *The De Novo Exception To Finality:*

In *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986), the Texas Supreme Court adopted § 13 of the Restatement (Second) of Judgments which holds that a judgment is final for purposes of issue and claim preclusion despite the taking of an appeal unless the "appeal" is actually a trial *de novo*.

Before *Scurlock*, no Texas judgment being appealed was entitled to collateral estoppel effect until all appeals were exhausted. By adopting the Restatement, *Scurlock* changed Texas law significantly by imparting finality to a judgment being appealed, for the purposes of collateral estoppel, *except* where the appeal is actually a trial *de novo*.

The *de novo* exception applies here. The state court judgment is a summary judgment based on undisputed facts. The state trial, court's interpretation of § 108(a) disposed of the Respondents' single defense of limitations, which disposed of the entire case. The State appellate court must only review the correctness of the state trial court's legal interpretation of § 108(a). To do so, the state appellate court must *itself* interpret and construe § 108(a) anew, unrestricted by any presumption or any deference favoring the trial court. The appeal is, in essence, a trial *de novo* of a pure

legal issue of federal statutory law arising from a set of uncontested material facts.

The case of *Citibank N.A. v. Graphic Scanning Corporation*, 618 F.2d 222 (2nd Cir. 1980) is analogous. There, the New York state trial court granted summary judgment, holding that as a matter of law, Graphic Scanning was not a common carrier under federal law and, therefore, its failure to comply with the Communications Act and F.C.C. rules was not a defense available to Citibank. After losing in the state trial court, Citibank filed a new suit against Graphic Scanning in the U.S. District Court for violating the Communications Act and F.C.C. Rules. In rejecting Graphic Scanning's plea of collateral estoppel, the Second Circuit stated at page 225 that:

> "Furthermore, because the state court found no facts, but merely expressed a conclusion of law, its determination that Scanning is not a common carrier is not preclusive in later federal litigation by reason of collateral estoppel." *Id.* at 255, citing *Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184 (2d Cir.) cert. denied, 350 U.S. 826, 76 S.Ct. 52 (1955); *Abramson v. Pennwood Investment Corp.*, 392 F.2nd 759 (2d Cir. 1968).

The application of *Citibank* to this case is clear. In both cases, a state trial court decided a pure question of federal law by granting summary judgment, thereby determining a party's status under a body of federal law, the subject of a federal court's specialized application and enforcement.

B. *Exception Relating to the Allocation of Jurisdiction:*

Aside from the absence of finality, the state court judgment is not entitled to any collateral estoppel effect because of the subject matter involved. After dealing with the finality issue, the court in *Scurlock*, *supra* at page 7, acknowledged the controlling effect of § 28 of the Restatement (Second) of Judgments, which recognizes certain exceptions to the application of collateral estoppel, *regardless of finality.*

In pertinent part, § 28, Restatement (Second) of Judgments provides that:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . .
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts *or by factors relating to the allocation of jurisdiction between them*; (emphasis added).

In the instant case, the *allocation of jurisdiction* between the Bankruptcy Court and the state court warrants a new determination of Petitioners' standing to invoke 11 USC § 108(a). However, Petitioners should not be misunderstood to say that the state court lacked subject matter jurisdiction. Clearly, the state court had jurisdiction to decide whether Petitioners' malpractice action was barred by limitations, which necessarily required it to construe §108(a) of the Bankruptcy Code. Contrary to Respondents' arguments below, which Petitioners' submit effectively sidetracked the courts below, the point is not whether the state court had jurisdiction, but whether the federal judiciary's special responsibilities for the federal bankruptcy laws renders this the type of case envisioned by the Restatement, where collateral estoppel simply does not apply *at all.*

Bankruptcy law is constitutionally committed to the federal judiciary. Bankruptcy courts constitute special units of the U.S. District Courts. 28 USC § 151. U.S. District Courts have original and exclusive jurisdiction of all cases under Title 11. *See* 28 USC § 1334(a). Bankruptcy judges are judicial officers of the U.S. District Court exercising original and exclusive subject matter jurisdiction over cases arising under Title 11, USC. *See* 28 USC § 152(a)(1). A state court's only brush with the bankruptcy laws is apt to be an interpretation of the Bankruptcy Code

incidental to deciding a state law question, as happened here. In contrast, the Bankruptcy Court's chief function is to interpret and apply the Bankruptcy Code. A person in bankruptcy ought to be able to look to the court administering that bankruptcy for a determination of his status, standing and rights under § 108(a), or any other section of the Bankruptcy Code, unfettered by a prior determination by a state court acting outside its bailiwick.

ISSUE NO. 2

STANDING UNDER 11 U.S.C. §108(a)

A. *Introduction:*

Section 108(a) extends the time to file suit on a bankrupt's cause of action which is not already barred by limitations on the date of filing the bankruptcy petition. It states that:

> (a) If applicable non-bankruptcy law, an order entered in a non-bankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the latter of —
>
> 1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> 2) two years after the order for relief.

All parties agree that the applicable two-year period of limitations under Texas law had not expired on March 25, 1988, the date Petitioners filed for relief under Chapter 11. The dispute is over Petitioners' standing to invoke the tolling provisions of § 108(a), which facially extends the period within which the "trustee" may file suit. No trustee has ever been appointed. Petitioners have functioned as "debtors-in-possession", having all of the rights and powers of a trustee. A debtor in possession is entitled to all the benefits of § 108(a). 11 USC § 1107(a) *In re Flying S Land & Cattle Co.*, 71 B.R. 183 (D. Nevada 1987);

Seawinds, Ltd. v. Nedlloyd Lines, B.V., 80 B.R. 181, 187 (N.D. Cal. 1987).

However, Respondents claim that Petitioners somehow lost their status as debtors in possession, and concomitantly their standing to invoke § 108(a), upon confirmation of their reorganization plan on June 28, 1989; that the event of confirmation itself automatically terminates the bankruptcy court's jurisdiction over Petitioners, and converts a debtor in possession to a mere debtor having no trustee powers. Respondents are wrong. In any event, a post-confirmation bankrupt should have standing under § 108(a) regardless of whether he is seen as a "debtor in possession" carrying out his plan or a "debtor" doing so. That is consistent with parallel cases recognizing a post-confirmation debtor's right (and even a creditor's right) to sue for preferences and fraudulent transfers under §§ 547 and 548 of the Bankruptcy Code, which, like § 108(a) ostensibly empower only the "trustee" to act.

B. *The Debtor/Debtor-in-Possession Distinction is Inappropriate and Irrelevant:*

Respondents have rely heavily on the Fifth Circuit's opinion in *Cunningham v. Healthco, Inc.*, 824 F.2d 1448, 1460 (5th Cir. 1987). There, the debtor/debtor-in-possession filed suit *after* confirmation and invoked §108(a) to defeat the limitations defense of Healthco, Inc. Healthco argued unsuccessfully that confirmation of the plan automatically terminated the bankruptcy estate and the debtor's status as debtor in possession and, *ergo*, as "trustee". The plan reserved one-half of the recoveries for the Class 6 creditors. In permitting the debtor to invoke § 108(a), the Fifth Circuit held that the reservation in the plan was *sufficient* to defeat Healthco's argument. The Fifth Circuit did not have to decide and did not decide whether such a reservation is *necessary* to preserve standing under § 108(a). *See, In re Tennessee Wheel & Rubber Co.*, 64 B.R. 721 (N.D. Tenn. 1986), where the absence of such a reservation in the plan did not prevent a post-confirmation "debtor" from exercising the "trustee" powers under Sections 547 and 548 to file and prosecute preferential transfer

and fraudulent conveyance actions, *after* confirmation. Respondents have erroneously cited *Cunningham* for what it did *not* hold.

The rule stated in *Cunningham* applicable here is that *until the period of reorganization has ended*, the debtor in a Chapter 11 case without a trustee has standing to invoke § 108(a). The pertinent language of the Fifth Circuit opinion appears at page 1460:

> Thus, the statute of limitations is distilled to the question of whether Dental Leasing was still a debtor-in-possession on July 2, 1984. If it was, then it would have been entitled to rely on § 108's tolling of limitations period, and the limitations period would extend back to February 24, 1981. On the other hand, *if the reorganization period had ended* and Dental Leasing had returned to "debtor" status, then § 108's protection would not have been available to it . . . (emphasis added).

This analysis is misguided, because "distilling" the § 108(a) standing issue to whether a debtor is "still a debtor-in-possession" incorrectly attempts to distinguish between the two. They are one in the same. Section 1101(1) defines "debtor-in-possession" to mean debtor except when a person is serving as a trustee. Section 101(12) defines "debtor" to mean a person concerning which a case has been commenced. A case is "commenced" when a voluntary petition is filed by a person. 11 USC § 301. Once a case is commenced, it can only terminate by dismissal under § 349 or § 1112; closing of the case under § 350, and only then after the bankruptcy estate is fully administered; or it can be converted to a Chapter 7 liquidation under § 1112. "Debtor-in-possession" is synonymous with "debtor" in a Chapter 11 case, where no trustee is appointed, so as not to confuse the case with a Chapter 11 proceeding where a trustee has been appointed, in which case the debtor/trustee dichotomy applies. In a Chapter 11 case with no trustee, there is a debtor-in-possession until the case is closed, dismissed, or converted to a Chapter 7 case; there is either a debtor-in-possession or there is no Chapter 11 case. *See*:

In re Triangle Chemicals, Inc., 697 F.2d 1280, 1290 (5th Cir. 1983); *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569 (Bankr. N.D. Tex. 1986); and *In re Hargis*, 73 B.R. 622, 625 (Bankr. N.D.Tex. 1987). In *Triangle Chemicals*, the Fifth Circuit Court of Appeals stated succinctly at 1290:

> As we view it, . . . there is no distinction between the "debtor" and the "debtor-in-possession" (where no trustee is appointed) with regard to the acts or transactions performed on its behalf subsequent to the filing of the reorganization petition.

C. *If the Debtor/Debtor-in-Possession Distinction Is Valid, the Period of Petitioners' Reorganization Had Not Ended by September 19, 1989. Thus, Their Status as Debtors-in-Possession Had Not Terminated.*

If the debtor/debtor-in-possession distinction does exist and does control standing under § 108(a) then when does a debtor cease to be a debtor-in-possession? The Fifth Circuit Court's language in *Cunningham* quoted above, suggests that debtor-in-possession status continues *at least* as long as the period of reorganization, a term not defined or used in the Bankruptcy Code or elucidated in *Cunningham*. Apparently, it is a term of art. A fair reading of *Cunningham* does not compel the conclusion that confirmation terminates the period of reorganization. Moreover, that conclusion is contrary to the well established law discussed *infra* that confirmation does not terminate the bankruptcy estate or its administration.

In the instant case, the plan confirmed on June 28, 1989, required the Petitioners to pay its unsecured creditors $20,000.00 within sixty (60) days, and another $20,000.00 each six months after confirmation until they were paid in full. It also provided for the payment of a long-term mortgage of a secured creditor and the litigation of several disputed claims, through objection hearings or, in the case of creditors Lyn Noble Hawthorne and Oliver Daniel, through full-blown evidentiary hearings and contested proceedings then pending in separate adversary

proceedings over which the plan reserved continuing jurisdiction and control by the Bankruptcy Court. Whatever the duration of the period of reorganization, it certainly had not ended by September 19, 1989. It was barely underway.

To support their argument that confirmation terminates debtor-in-possession (and thus, trustee) status, Respondents have employed a faulty syllogism which reads as follows:

> *Major Premise*: Under Section 1141(b), all property of the bankruptcy estate vests in the debtor upon confirmation of the plan, unless otherwise provided in the plan.
>
> *Minor Premise*: Since all property of the estate vests in the debtor on confirmation, the event of confirmation terminates the bankruptcy estate and the administration of it.
>
> *Conclusion*: If the bankruptcy estate, and its administration, terminates upon confirmation, then there can be no debtor-in-possession post-confirmation.

Though the major premise is correct, the minor premise, and therefore the conclusion, is wrong. Confirmation of the plan does *not* terminate the bankruptcy estate or its administration, but is merely one step in the administration process. *In re Lombard-Wall, Inc.*, 44 B.R. 928, 935 (S.D.N.Y. 1984), citing this Court's opinion in *Meyer v. Kenmore Granville Hotel*, 297 U.S. 160 (1936). In *Lombard*, the Court noted that:

> It is well established that confirmation of a plan is but a step in the administration of the debtor's estate; the bankruptcy court is still responsible for overseeing execution of the plan. *Meyer v. Kenmore Granville Hotel*, 297 U.S. 160, 165-66, 56 S.Ct. 405, 407-08, 80 L.Ed. 557 (1936) . . .
>
> *****
>
> Although Lombard's reorganization plan has been confirmed and the allowed claims paid in full, the case is clearly not closed, because the plan is not consummated. HDC's disputed claim is yet to be adjudicated. Therefore,

the bankruptcy court retains jurisdiction to aid the effectuation of the plan.

"Notwithstanding the entry of an order of confirmation (of a plan of reorganization) the court may enter all orders necessary to administer the *estate*." *Bankruptcy Service, Lawyers' Edition*, Ch. 6-10C, § 7B:66, at p. 51; Bankruptcy Rule 3020(d). Distributions to unsecured creditors under the plan, for example, are *elements* of administration of a bankruptcy estate, the closing of which is not mandated until complete administration has occurred. *Id.*, p. 52; *In re Tennessee Wheel & Rubber Co.*, 64 B.R. 721, 727 (M.D. Tenn. 1986). Bankruptcy Rule 3022, entitled Final Decree, expressly provides that only after an estate is *fully administered* shall the court enter a final decree "closing the case". Bankruptcy Rule 3022 is the procedural expression of § 350(a) of the Bankruptcy Code.

It is "horn book" law of bankruptcy that:

> Confirmation does not render administration of the estate complete and terminate the Bankruptcy Court's jurisdiction, since the Bankruptcy Court retains post-confirmation jurisdiction to complete any actions pertinent to the plan, such as actions to avoid preferential transfers [citing *In Re Tennessee Wheel & Rubber, infra*]. Moreover, the Bankruptcy Court's retention of post-confirmation jurisdiction over proceedings to recover preferences does not deprive the debtor of standing to prosecute such claims after confirmation as authorized under 11 U.S.C. § 1123(b), *notwithstanding the fact that any proceeds of preference recoveries will not accrue to the creditors.* [citing *In Re Air One, Inc.* (1987, BC Ed. Mo.) 75 B.R. 998]. *Bankruptcy Service*, Lawyers' Edition, *supra*, § 66 at p. 52.

See also: *In re Weatherfield Farms, Inc.*, 34 B.R. 435, 438 (Bankr. D. Vt. 1983); *In re Chernicky Coal Co., Inc.*, 67 B.R. 828 (Bankr. W.D. Pa. 1986); *In re Fortner Oilfield Services, Inc.*, 49 B.R. 9, 10 (Bankr. N.D. Tex. 1984).

D. *Debtor-in-Possession Status Should Not Control the Issue of Standing Under § 108(a)*

Confirmation of a plan which does not reserve the cause of action in question *should not* terminate the debtor's standing under § 108(a), *even if* confirmation terminates debtor-in-possession status. This court should reject the Fifth Circuit's statements in *Cunningham* at 1460 that the limitations issue is "distilled" to whether the debtor is still a debtor-in-possession. That analysis is contrary to the underlying purpose of § 108(a) and incongruous with the established interpretation of analogous Bankruptcy Code provisions dealing with post-confirmation suits to recover preferences (§ 547) and fraudulent transfers (§ 548).

The clear purpose of § 108(a) is to provide a two-year "breathing spell" to evaluate prospective litigation and to gather the wherewithal to prosecute it. The court in *Seawinds* at p. 189 explained it this way:

> The purpose of § 108(a) of the Bankruptcy code, on the other hand, is to give the trustee or debtor sufficient time to decide whether to start a lawsuit. 'The debtor is granted a grace period to determine whether his rights, which might be unknown on the Filing Date, are worth pursuing in the courts.' *Matter of Lauderdale Motor Corp., supra*, 35 B.R. at 549. A broad reading of this provision furthers the bankruptcy goals of *preserving the maximum amount of property and business opportunities for the estate.* See *In re Santa Fe Development and Mortgage Corp., supra*, 16 B.R. at 168 (construing § 108(b)). Section 108(a) thus furthers the bankruptcy policy of preserving assets of the estate, *including a debtor's causes of action*, see 11 U.S.C. § 541(a)(1), which may be affected by statutes of limitation. (Emphasis added).

Importantly, this "breathing spell" also gives the debtor time to "heal up" financially in order to fight the fight. Section 1121 encourages the debtor to propose a plan within 120 days after filing bankruptcy, or else spend scarce resources fending off

creditors' motions to force a plan or convert the Chapter 11 reorganization to a Chapter 7 liquidation. Faced with this imperative, and the crippled financial condition that forced the debtor in bankruptcy, the debtor in most cases must commit substantially all of his limited resources to retain counsel, file bankruptcy and keep the post-petition boat afloat long enough to propose and get a plan confirmed. This environment will leave the debtor with little, if any, ability to finance litigation before confirmation.

Yet, Respondents would have the Court construe § 108(a) so as to force a Chapter 11 debtor to commence all litigation before confirmation, where state law limitations had already run, no matter how much of the two-year period under § 108(a) remained. Respondents' construction emasculates the statute. Ironically, it penalizes the debtor who strives for early confirmation and encourages debtors to delay proposing a plan in order to maximize the tolling benefits of § 108(a). Such a result is hardly beneficial to the debtor's creditors, whom § 108(a) was designed to protect.

In *In re Korvettes, Inc.*, 42 B.R. 217 (Bankr. S.D.N.Y. 1984), the Court voiced the same concern about forcing a debtor-in-possession to file preference actions before confirmation. The Court was construing § 546(a), which requires the "trustee" to file preference actions no later than two (2) years after the trustee's "appointment". The defendant argued that the date of bankruptcy was the debtor-in-possession's functional "appointment" as trustee; and, therefore, the debtor-in-possession had to file preference actions, if at all, no later than two years after the date of bankruptcy. The Court rejected that argument. The Court observed that many reorganization plans are not confirmed within two years of bankruptcy, and to require a debtor-in-possession to bring preference actions before confirmation would, in many cases, frustrate and impede the whole process of reorganization. At page 220, the Court stated the following:

> Thus, to compel the issue of preferences to be brought to the forefront prematurely in the reorganization process has

> the potential of impeding progress toward the formulation of a consensual plan and could indeed stall negotiations altogether. Such a blanket construction would thus either compel preference litigation to be brought in the midst of negotiations or compel all reorganizations, no matter the size of the interest or the complexity of the legal or economic issues involved, to be focused upon well in advance of two years from the filing date. In this era where large and complex reorganization cases have proliferated, either eventuality would place undue pressure on the effected parties. This, in turn, would run contrary to the essential goals and philosophy espoused in Code Chapter 11 of fostering the reorganization and avoiding the liquidation of troubled debtors.

Denying a post-confirmation debtor standing to invoke §108(a) is incongruous with parallel bankruptcy statutes. On its face, §108(a) purports to grant only the "trustee" an extension of limitations. Similarly, §§ 547(b) and 548(a) of the Bankruptcy Code purport to empower only the "trustee" to recover preferential and fraudulent transfers. However, it is well established that a debtor is entitled to commence actions after confirmation to recover preferential and fraudulent transfers, *even where* the plan does not expressly reserve or dedicate the recoveries from such actions to the creditors. *See*: *In re Tennessee Wheel & Rubber Co.*, *supra* at p. 723; *In re J. E. Jennings, Inc.*, 46 B.R. 167 (Bankr. E.D. Pa. 1985)

Another analogous case regarding standing is *In re Chernicky Coal Co., Inc.*, 67 B.R. 828, 832 (Bankr. W.D. Pa. 1986), which deals with standing to file actions under § 549 which only empowers the "trustee" to void certain post-petition transfers. There, the court held that even a debtor's *creditors* have standing to file and prosecute avoidance actions under § 549, though the statute only purports to grant the "trustee" a right of action.

If a post-confirmation debtor, who is not a debtor-in-possession, *and even his creditors*, may exercise the powers of a "trustee" to file and prosecute actions under §§ 547, 548, and 549,

then why may he not stand in the same trustee shoes and invoke §108(a)? *There is no rational basis for such disparate treatment.*

The court's opinion in *Tennessee Wheel* exposes the weakness and error of Respondents' assertion that confirmation terminates the bankruptcy estate and its administration and transforms a debtor-in-possession to a mere debtor with no trustee powers. There, the debtor filed avoidance actions under §§ 547 and 548 *after* confirmation. Significantly, the plan provided that all property of the estate, *including recoveries from the avoidance actions*, would vest in the debtor upon confirmation free and clear of the claims of the creditors (Id. at 723); it did not reserve any portion of the recoveries to the creditors. The court characterized the post-confirmation debtor as the successor-in-interest to the pre-confirmation debtor (Id. at 727), with standing to file and prosecute the avoidance actions.

The centerpiece of Respondents' argument is this: since § 1141 vests all property of the estate in the debtor upon confirmation, any recoveries from a suit filed post-confirmation will only inure to the debtor, not the creditors. In a well-reasoned analysis, the Court in *Tennessee Wheel*, at pp. 725-727, thoroughly and categorically discredited and rejected that argument (Id. at 725-727):

> The 'benefit' to unsecured claimholders necessary to support a debtor's post-confirmation recovery powers has taken many forms in the reported decisions. In the leading case, Judge Bare found benefit to unsecured claimholders sufficient to support avoidance powers in a post-confirmation successor-in-interest to the debtor as follows:
>
> > As noted, all those general, unsecured creditors whose claims were impaired under the Modified Plan received as part and parcel of their distribution either actual shares of stock or certain rights to purchase shares of stock in the successor-in-interest. Clearly, to the extent that plaintiff's recovery of fraudulent transfers and preferences

> operates to increase the assets and financial health of the successor-in-interest, it also operates to proportionately increase the value of those ownership rights in the successor-in-interest. Clearly, to the extent that plaintiff's recovery of fraudulent transfers and preferences operates to increase the assets and financial health of the successor-in-interest, it also operates to proportionally increase the value of those ownership rights in the successor-in-interest which constitute a portion of the unsecured creditors' distribution under the plan.

Duvoisin, 59 B.R. at 641. In *Centennial Industries* 12 B.R. at 102, the benefit to creditors was the likelihood that preference recoveries would increase the probability of success of reorganization. This was sufficient benefit notwithstanding that the distribution percentage to unsecured claimholders was fixed by the plan (as is here the case) and would not be increased by preference recoveries. In *J.E. Jennings, Inc. v. William Carter Co.*, 46 B.R. 167 (Bankr. E.D. Pa. 1985), the court permitted the debtor to pursue preference actions post-confirmation although the transfers and the debtor's intent to avoid them were not disclosed prior to confirmation and there was no indication that recovery would affect the dividend to unsecured claimholders. The court stated that confirmation should not be a windfall for the preferential transferee. *Id.* at 170.

[The court then proceeded to discuss *Tennessee Wheel's* avoidance of transfers actions]

The post-confirmation exercise of these powers is one source of the debtor's repayment of money advanced by FANB to pay the general creditors. This estate has unsecured priority and administrative claimants and unpaid post-petition trade creditors who are dependent for payment upon the success of reorganization. The

> preference and fraudulent conveyance recoveries are essential to the debtor's ability to pay its creditors pursuant to the confirmed plan.
>
> Denying avoidance powers to the post-confirmation debtor would imbalance the equities of this case. These defendants would escape with their avoidable transfers *through the happenstance of the timing of lawsuits* within the reorganization case.

Respondents' "no benefit to creditors" argument overlooks the obvious. Under § 1141(b), a cause of action sued on *before* confirmation vests in the debtor upon confirmation just as completely as a cause of action sued on *after* confirmation. Here, had Petitioners sued Respondents the day *before* confirmation, this cause of action would have vested in them the next day free and clear of the claims of creditors. According to Respondents' logic, whatever vests in the debtor upon confirmation by the operation of § 1141(b) will only benefit the debtor and not the creditors. Respondents evidently suppose that because the plan does not *require* the debtor to use post-confirmation recoveries to pay creditors, the debtor will not so need them. That is absurd!

It is the very properties, which vest in the debtor upon confirmation that must be utilized one way or another to pay the creditors *after* confirmation. Only the plan provides for payments to creditors. Only confirmation activates the plan. Payments to creditors only occur *upon* or after confirmation. Strangely, the Respondents seem to have no problem with a debtor using his properties and cash, after confirmation, to *start* paying creditors under the plan, but object to a debtor pursuing causes of action (particularly against these Respondents) to generate funds to *continue* paying creditors under the plan.

The court in *Tennessee Wheel*, at p. 726, further criticized the Respondents' arguments by pointing to the fundamental inequity

of denying a post-confirmation debtor the powers of a trustee to prosecute avoidance actions and, by analogy, the powers of a trustee to invoke § 108(a). The court stated:

> Denying avoidance powers to the post-confirmation debtor would imbalance the equities of this case. These defendants would escape with their avoidable transfers through the happenstance of the timing of lawsuits within the reorganization case.

The *Tennessee Wheel* court cited *J. E. Jennings, Inc. v. William Carter Co., supra.* The court noted that *Jennings* permitted the debtor to pursue post-confirmation actions even though those actions were *not disclosed* prior to confirmation and even though ". . . there was no indication that recovery would affect the dividend to unsecured claimholders . . . [because] *confirmation should not be a windfall for the preferential transferee. Id.* at 170." *Id.* at 725-726.

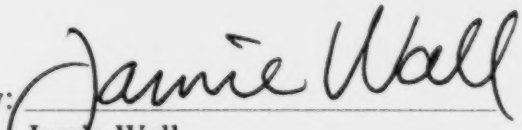
The Defendants here seek to enjoy the same windfall — to evade liability for their negligent conduct, which damaged Plaintiffs severely and put them in bankruptcy, merely because Plaintiffs sued them about 18 months into the 24-month extension period, rather than about 15 months into the 24-month extension period. It is difficult to imagine a more inequitable result. It is indeed a windfall considering that § 108(a) clearly imparts notice to the Respondents of the prospect of suit for up to two years after Petitioners filed bankruptcy.

CONCLUSION

The District Court, the Bankruptcy court and the Fifth Circuit Court of Appeals erred in relying on the doctrine of collateral estoppel to avoid deciding the merits of this controversy. The State Court Judgment is simply not entitled to a collateral estoppel effect. There were no disputed fact issues below. Petitioners were entitled to summary judgment in the Bankruptcy Court declaring that they had standing to invoke the tolling provisions of § 108(a) on September 19, 1989, when they sued Respondents in State Court. It would be wasteful to remand this case for a

decision on the merits of the standing issue. Regardless of how the courts below might decide that issue on remand, an appeal is inevitable; the question at hand is too important. In the interest of judicial economy, and to minimize the expense to the litigants, this Court should decide the § 108(a) standing issue on its merits.

Respectfully submitted,

By: 

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Dated: June 22, 1992

(2)

91-2050

No.

FILED
JUN 22 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAY G. BESING AND RAY G. BESING & ASSOCIATES, P.C.,
Petitioners,

v.

SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, P.C.;
M. J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS;
LYNCH, CHAPPEL, ALLDAY AND ALLSUP;
AND SMALL, CRAIG & WERKENTHIN
Respondents.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Counsel for Petitioners
Ray G. Besing and
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June 22, 1992

Note: None of the corporations listed as parties to this proceeding have parent companies or subsidiaries.

SECTION A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-1793

IN THE MATTER OF:

RAY G. BESING & ASSOCIATES and RAY G. BESING,

Debtors.

RAY G. BESING & ASSOCIATES and RAY G. BESING,

Appellants,

versus

SEEGLIGSON, DOUGLAS, FALCONER & VANDEN EYKEL,
A Professional Corporation;
M. J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS;
LYNCH, CHAPPELL, ALLDAY & ALSUP; and
SMALL, CRAIG & WERKENTHIN,

Appellees.

Appeal from the United States District Court for the Northern District of Texas
(CA3-90-2561-D)

(Feb. 21, 1992)

Before JOLLY and EMILIO M. GARZA, Circuit Judges, and SHAW, District Judge.*

E. GRADY JOLLY, Circuit Judge:**

Ray G. Besing, a Dallas attorney, and his law firm, Ray G. Besing & Associates, P.C. (collectively "Besing") appeal from the district court's judgment affirming the bankruptcy court's summary judgment in favor of the appellees. Besing had sought

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*Chief Judge of the United States District Court for the Western District of Louisiana, sitting by designation.

**Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

a declaratory judgment that his legal malpractice claims against the appellees were not time-barred because of the tolling provisions of 11 U.S.C. § 108(a)[1]; however, the bankruptcy and district courts held that a prior state court judgment collaterally estopped Besing from relitigating the applicability of section 108(a). We AFFIRM.

I.

On March 25, 1988, Besing filed a voluntary bankruptcy petition under Chapter 11. Besing listed his claims against the appellees as assets in the bankruptcy schedules. No trustee was appointed, and the cases have not been closed.

On June 25, 1989, the bankruptcy court confirmed Besing's joint plan of reorganization. The plan did not contain any reservation of proceeds from the legal malpractice claims for the benefit of Besing's creditors.

On September 19, 1989, Besing sued the appellees for legal malpractice in Texas state court. On May 31, 1990, the state court granted the appellees' motion for summary judgment, holding that Besing's suit was barred by the statute of limitations. The state court concluded that confirmation of Besing's plan of reorganization terminated Besing's status as debtor-in-possession and, therefore, Besing was not entitled to rely on 11 U.S.C.

---

[1]Section 108(a) of the Bankruptcy Code extends the time for filing suit on a debtor's cause of action that is not already barred by limitations on the date of the filing of the bankruptcy petition:

> (a) If applicable nonbankruptcy law . . . fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of —
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) two years after the order of relief.

11 U.S.C. § 108(a).

§108(a) to extend the period of limitations for two years from the date of filing bankruptcy. Besing's appeal from the state court's judgment is still pending.

II.

On June 14, 1990, Besing filed a complaint in bankruptcy court, seeking a declaratory judgment that Besing had standing to invoke section 108(a) when the state court malpractice action was filed. The parties filed cross-motions for summary judgment. The bankruptcy court granted the appellees' motion for summary judgment, applying collateral estoppel and holding that the state court judgment barred Besing from re-litigating the applicability of section 108(a). The district court affirmed the bankruptcy court's judgment, and Besing filed a timely notice of appeal.

III.

"A federal court determining the preclusive effect of prior state court judgments must apply the law of the state from which the judgment emerged." *Eubanks v. Getty Oil Co.*, 896 F.2d 960, 962 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 252 (1990). Under Texas law, "[t]he party seeking to invoke the doctrine of collateral estoppel must establish that (1) the facts sought to be litigated in the second suit w[ere] fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action." *Scurlock Oil Co. v. Smithwick*, 787 S.W.2d 560, 562 (Tex. App. — Corpus Christi 1990).

Besing argues that the state court judgment is not entitled to collateral estoppel effect for two reasons: (1) the pending state court appeal is a *de novo* review of a pure question of law and, therefore, the state court judgment is not final; and (2) regardless of finality, the nature of bankruptcy law as a unique and specialized body of federal law, jurisdiction of which is committed to the federal courts, brings this case within the "special allocation of jurisdiction" exception to collateral estoppel recognized in Restatement (Second) of Judgments section 28.

A

In *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986), the Texas Supreme Court adopted section 13 of the Restatement (Second) of Judgments, which provides that a judgment is final for purposes of collateral estoppel "despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo." 724 S.W.2d at 6.

Besing argues that the *de novo* exception applies here because the state trial court's summary judgment was based upon undisputed facts and involved in pure legal issue— the applicability of section 108(a). Therefore, according to Besing, the state appellate court will interpret section 108 anew, without any presumption or deference to the trial court's ruling.

Besing failed to present this argument to the bankruptcy and district courts. We ordinarily refuse to consider issues not raised before the trial court, unless the "new issue raises a pure question of law, and failure to consider it would result in a miscarriage of justice." *Batiansila v. Advanced Cardiovascular Systems, Inc.*, ___ F.2d ____, 1992 WL 7600, *2 (5th Cir. 1992). Although Besing's argument raises a "pure question of law," our failure to consider it will not result in a "miscarriage of justice," because the argument is meritless. Texas courts define a trial *de novo* as:

> A de novo trial means "anew, afresh; in the same manner; with the same effect; a second time." Power to try a case de novo vests a court with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court . . . . [W]e conclude that a de novo judicial trial means a full civil trial on the facts as well as the law.

Lone Star Gas Co. v. State, 137 Tex. 279, 153 S.W.2d 681, 692 (1941) (citations omitted). The state appellate court's review of the state trial court's judgment is not a trial *de novo*, but an exercise of appellate jurisdiction. Therefore, the *de novo* exception relied on by Besing is inapplicable.

B

Besing next contends that the application of collateral estoppel is inappropriate pursuant to the Restatement (Second) of Judgments, section 28, which provides:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> * * *
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them . . .

Besing argues that the allocation of jurisdiction between the bankruptcy court and the state court, and the federal judiciary's dominance over bankruptcy law, warrants a new determination by the bankruptcy court regarding the applicability of section 108(a).

Besing concedes that the state court had subject matter jurisdiction. As this court recently noted, "the only aspect of the bankruptcy proceeding over which the district courts and their bankruptcy units have exclusive jurisdiction is 'the bankruptcy petition itself.' " *Matter of Brady, Texas, Municipal Gas Corp.*, 936 F.2d 212, 218 (5th Cir.), *cert. denied sub nom. Sanders v. City of Brady, Tex.*, ____ U.S. ____, 112 S. Ct. 657 (1991). "In other matters arising in or related to title 11 cases, unless the [Bankruptcy] Code provides otherwise, state courts have concurrent jurisdiction, and bankruptcy courts are prohibited from relitigating these matters if the state courts have already resolved them." *Id.*

The state court's determination that the statute of limitations was not tolled by section 108(a) is not a matter that is within the exclusive jurisdiction of the bankruptcy court. Therefore, the "special allocation of jurisdiction" exception to collateral estoppel is inapplicable.

C

Because we hold that application of collateral estoppel was appropriate, it is not necessary for us to reach the merits regarding the applicability of section 108(a).

III.

The bankruptcy and district courts correctly held that Besing is collaterally estopped from relitigating the applicability of 11 U.S.C. § 108(a). Accordingly, the judgment of the district court is

AFFIRMED.

SECTION B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-1793

IN THE MATTER OF:

RAY G. BESING & ASSOCIATES and RAY G. BESING,

Debtors.

RAY G. BESING & ASSOCIATES and RAY G. BESING,

Appellants,

versus

SEEGLIGSON, DOUGLAS, FALCONER & VANDEN EYKEL,
A Professional Corporation;
M. J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS;
LYNCH, CHAPPELL, ALLDAY & ALSUP; and
SMALL, CRAIG & WERKENTHIN,

Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(March 24, 1992)

Before JOLLY and EMILIO M. GARZA, Circuit Judges, and SHAW, District Judge.*

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

\S\

United States Circuit Judge

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*Chief Judge of the United States District Court for the Western District of Louisiana, sitting by designation.

SECTION C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE RAY G. BESING ASSOCIATES, P.C. AND RAY G. BESING,	§	
Debtors.	§	
RAY G. BESING and RAY G. BESING & ASSOCIATES, P.C.,	§	
Plaintiffs-Appellants,	§	
VS.	§	Civil Action No. CA3-90-2561-D (Bank. Ct. Nos. 388-31750-SAF-11 and 388-31749-SAF-11) (Adversary No. 390-3386)
SEELIGSON, DOUGLAS, FALCONER & VANDEN EYKEL, *a Professional Corporation;* M. J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS; LYNCH, CHAPPELL, ALLDAY & ALSUP; AND SMALL, CRAIG & WERKENTHIN,	§	
Defendants-Appellees.	§	

APPEAL FROM THE
UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
STEVEN A. FELSENTHAL, BANKRUPTCY JUDGE, PRESIDING

FITZWATER, District Judge:

In this appeal by two chapter 11 debtors challenging a summary judgment entered by the bankruptcy court, the court concludes the bankruptcy court correctly gave collateral estoppel

effect to a prior state court judgment. Appellants do not challenge that the elements for collateral estoppel are met. They instead argue that factors relating to the allocation of jurisdiction between two different courts merit the bankruptcy court's deciding the question of bankruptcy law anew. But the state court judgment was a final one when analyzed under Texas or federal law and did not deal with a dischargeability determination, which would fall within the exclusive jurisdiction of the bankruptcy court. *Cf.* 11 U.S.C. § 523(a)(2, 4, 6). The bankruptcy court's summary judgment was not in error and it is, accordingly,

AFFIRMED.

June 27, 1991.

\S\

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE RAY G. BESING ASSOCIATES, P.C. AND RAY G. BESING,	§	
Debtors.	§	
RAY G. BESING and RAY G. BESING & ASSOCIATES, P.C.,	§	
Plaintiffs-Appellants,	§	
VS.	§	Civil Action No. CA3-90-2561-D (Bank. Ct. Nos. 388-31750-SAF-11 and 388-31749-SAF-11) (Adversary No. 390-3386)
SEELIGSON, DOUGLAS, FALCONER & VANDEN EYKEL, *a Professional Corporation;* M. J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS; LYNCH, CHAPPELL, ALLDAY & ALSUP; AND SMALL, CRAIG & WERKENTHIN,	§	
Defendants-Appellees.	§	

APPEAL FROM THE
UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
STEVEN A. FELSENTHAL, BANKRUPTCY JUDGE, PRESIDING

JUDGMENT

This appeal came on for consideration on the briefs, with oral argument. For the reasons stated in the court's opinion filed

June 27, 1991, the bankruptcy court's judgment entered October 2, 1990 is affirmed.

Costs of this appeal are taxed against plaintiffs-appellants Ray G. Besing & Associates, P.C. and Ray G. Besing pursuant to Fed. R. Bankr. P. 8014.

Entered: June 27, 1991.

NANCY DOHERTY
Clerk of Court

By: \S\

SECTION D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE RAY G. BESING ASSOCIATES, P.C. AND	§	Case No. 388-31750-SAF-11
RAY G. BESING,	§	Case No. 388-31749-SAF-11
Debtors.	§	
RAY G. BESING and RAY G. BESING & ASSOCIATES, P.C.,	§	
Plaintiffs,	§	
VS.	§	Adv. No. 390-3386
SEELIGSON, DOUGLAS, FALCONER & VANDEN EYKEL, *a Professional Corporation;* M. J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS; LYNCH, CHAPPELL, ALLDAY & ALSUP; AND SMALL, CRAIG & WERKENTHIN, and WALLACE M. SMITH	§	
Defendants.	§	

ORDER DENYING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT

On this the 28th day of September, 1990, came on to be heard the Motions for Summary Judgment of Plaintiffs and all of the Defendants in the above-entitled and numbered cause; and the Court having considered said motion, the summary judgment evidence, pleadings and argument, is of the opinion that there is no genuine issue of material fact in connection with the above-

entitled and numbered cause, that Plaintiffs' declaratory judgment action is barred on collateral estoppel grounds and that Plaintiffs' Motion for Summary Judgment should be denied and Defendants' Motions for Summary Judgment should be granted as a matter of law;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Summary Judgment is denied and all Defendants' Motions for Summary Judgment are in all things granted; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that summary judgment in all things is hereby entered in the above-entitled and numbered cause in favor of all Defendants and against Plaintiffs Ray G. Besing, Individually, and Ray G. Besing & Associates, P.C.; and that all costs herein be, and they hereby are taxed against Plaintiffs.

SIGNED this 15th day of October, 1990.

\S\

JUDGE PRESIDING

SECTION E

11 U.S.C. § 101

(12) "Debtor" means person or municipality concerning which a case under this title has been commenced;

11 U.S.C. § 108. Extension of time

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief.

11 U.S.C. § 301. Voluntary cases

A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

11 U.S.C. § 349. Effect of dismissal

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this tile, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(f) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. § 350. Closing and reopening cases

(a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.

(b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

11 U.S.C. § 546. Limitations on avoiding powers

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—

(1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or

(2) the time the case is closed or dismissed.

11 U.S.C. § 547. Preferences

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive it—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

* * *

11 U.S.C. § 549. Postpetition transactions

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—

(1) that occurs after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

(b) The trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be

recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

* * *

11 U.S.C. § 1101. Definitions of this chapter

In this chapter [11 USCS §§ 1101 et seq.] —

(1) "debtor in possession" means debtor except when a person that has qualified under section 322 of this title [11 USCS § 322] is serving as trustee in the case;

* * *

11 U.S.C. § 1107. Rights, powers, and duties of debtor in possession

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

11 U.S.C. § 1112. Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title unless —

(1) the debtor is not a debtor in possession;

(2) the case originally was commenced as an involuntary case under this chapter; or

(3) the case was converted to a case under this chapter other than on the debtor's request.

(b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including —

(1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;

(2) inability to effectuate a plan;

(3) unreasonable delay by the debtor that is prejudicial to creditors;

(4) failure to propose a plan under section 1121 of this title within any time fixed by the court;

(5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;

(7) inability to effectuate substantial consummation of a confirmed plan;

(8) material default by the debtor with respect to a confirmed plan;

(9) termination of a plan by reason of the occurrence of a condition specified in the plan; or

(10) nonpayment of any fees or charges required under chapter 123 of title 28.

(c) The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion.

(d) The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if —

(1) the debtor requests such conversion;

(2) the debtor has not been discharged under section 1141(d) of this title; and

(3) if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.

(e) Except as provided in subsection (c) and (f), the court, on request of the United States trustee, may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate if the debtor in a voluntary case fails to file, within fifteen days after the filing of the petition commencing such case or such additional time as the court may allow, the information required by paragraph (1) of section 521, including a list containing the names and addresses of the holders of the twenty largest unsecured claims (or of all unsecured claims if there are fewer than twenty unsecured claims), and the approximate dollar amounts of each of such claims.

(f) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

11 U.S.C. § 1121. Who may file a plan

(a) The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.

(b) Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.

(c) Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if —

(1) a trustee has been appointed under this chapter;

(2) the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter; or

(3) the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.

(d) On request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referring to in this section.

11 U.S.C. § 1141. Effect of confirmation

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

* * *

28 U.S.C. § 151. Designation of bankruptcy courts

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter [28 USCS §§ 151 et seq.] with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 USC § 152. Appointment of bankruptcy judges

(a)(1) The United States court of appeals for the circuit shall appoint bankruptcy judges for the judicial districts established in paragraph (2) in such numbers as are established in such paragraph. Such appointments shall be made after considering the recommendations of the Judicial Conference submitted pursuant to subsection (b). Each bankruptcy judge shall be appointed for a term of fourteen years, subject to the provisions of subsection (e). Bankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution [USCS, Constitution, Art. III].

28 U.S.C. § 1254(1) and (2).

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in

sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

Bankruptcy Rule 3020(d). Deposit; Confirmation of Plan

(d) *Retained Power*. Notwithstanding the entry of the order of confirmation, the court may enter all orders necessary to administer the estate.

Bankruptcy Rule 3022.

Final Decree in Chapter 11 Reorganization Case.

After an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case.

28 U.S.C. § 1334. Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11 [11 USCS §§ 101 et seq.].

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [11 USCS §§ 101 et seq.], or arising in or related to cases under title 11 [11 USCS §§ 101 et seq.].

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No. 91-2050

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAY G. BESING and RAY G. BESING & ASSOCIATES, P.C.,

Petitioners,

v.

SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, P.C.; M.J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS; LYNCH CHAPPEL, ALLDAY & ALSUP; and SMALL, CRAIG & WERKENTHIN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON BEHALF OF RESPONDENTS SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, P.C. AND M.J. "IKE" VANDEN EYKEL

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July 7, 1992

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES i

ABBREVIATIONS AND RECORD REFERENCES. v

REPLY STATEMENT OF THE CASE. 1

REPLY STATEMENT OF THE ISSUES PRESENTED. 4

SUMMARY OF THE ARGUMENT. 4

ARGUMENT AND AUTHORITIES:

I. After Confirmation of Theit Chapter 11 Bankruptcy Plan of Reorganization, The Besings Brought Suit In State Court Against Respondents. After An Adverse Decision Based on Limitations, The Besings Brought Suit in The Bankruptcy Court for a Determination of The Same Issue Against the Identical Parties. Did The District Court and The Court of Appeals Properly Affirm the Bankruptcy Court's Grant of Respondents' Motion for Summary Judgment on the Grounds of Collateral Estoppel? (Applicable to Petitioners' Issue Number 1) 6

II. Was the Tolling Provision of 11 U.S.C. §108(a) Available to Petitioners at the Time the State Court Suit Was Filed? (Applicable to Petitioner's Issue Number 2) 11

CONCLUSION 22

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

Cases:

American General Fire and Casualty Co. v. Schattman, 761 S.W.2d 582 (Tex. App. – Fort Worth 1988, no writ) 8

Bache v. AT&T, 840 F.2d 283 (5th Cir. 1988) 6

Brown v. Felsen, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979). 11

Cases, continued: Page

Citibank N.A. v. Graphic Scanning Corp., 618 F.2d 222 (2d Cir. 1980) 10

CLS Associates v. A.B., 762 S.W.2d 221 (Tex. App. – Dallas 1988, no writ) 9

Craig v. Barclays American Financial, Inc. (In re Craig), 7 B.R. 864 (Bankr. E.D. Tenn. 1980) 15

Crocker Nat'l Bank v. Ideco Div. of Dresser Industries, Inc., 839 F.2d 1104 (5th Cir. 1988) 6

Cunningham v. Healthco, Inc., 824 F.2d 1448 (5th Cir. 1987) 13, 14, 15, 17, 18, 20

Fanelli v. Hensley (In re Triangle Chemicals, Inc.), 697 F.2d 1280 (5th Cir. 1983). 16

Flying "S" Land & Cattle Co. v. Beaumont (In re Flying "S" Land & Cattle Co. Inc.), 71 B.R. 183 (Bankr. D. Nev. 1987). 16, 17, 18

Frank C. Bailey Enterprises, Inc. v. Cargill, Inc., 582 F.2d 333 (5th Cir. 1978) 8

In re Chapel Gate Apartments, Ltd., 64 B.R. 569 (Bankr. N.D. Tex. 1986) 16, 17

In re Grinstead, 75 B.R. 2 (D. Minn. 1985). 12, 13

In re Hargis, 73 B.R. 622 (Bankr. N.D. Tex. 1987). 17, 18

In re Lawler, 106 B.R. 943 (Bankr. N.D. Tex. 1989) 12

J.E. Jennings, Inc. v. Williams Carter Co. (In re J. E. Jennings, Inc.), 46 B.R. 167 (Bankr. E.D. Penn. 1985) 20

Korvettes, Inc. v. Sanyo Electric, Inc. (In re Korvettes, Inc.), 42 B.R. 212 (Bankr. S.D.N.Y. 1984). 20, 21

Lombard-Wall, Inc. v. New York City Housing Development Corp. (In re Lombard-Wall, Inc.), 44 B.R. 928 (Bankr. S.D.N.Y. 1984) 18

Lone Star Gas Co. v. State, 153 S.W.2d 681 (Tex. 1941). 9

Medina v. El Paso Machine & Steel Works, Inc., 740 S.W.2d 99 (Tex. App. – El Paso 1987, no writ). 9

Cases, continued: Page

Migra v. Warner City School Dist., 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) 7

Motor Carrier Audit & Collection Co. v. Lighting Products, Inc., 113 B.R. 424 (N.D. Ill. 1989) 14

Neptune World Wide Moving, Inc. v. Schneider Moving & Storage Co. (In re Neptune World Wide Moving, Inc.), 111 B.R. 457 (Bankr. S.D.N.Y. 1990) 21, 22

Nix v. Zervas, 92 B.R. 164 (Bankr. N.D. Tex. 1988). 11

Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986) 7

Prager v. El Paso Nat'l Bank, 417 F.2d 1111 (5th Cir. 1969) 10

Rives v. Franklin Life Ins. Co., 792 F.2d 1324 (5th Cir. 1986) 7

Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986). . . 7, 8

Seawinds Ltd. v. Nedlloyd Lines, B.V., 80 B.R. 181 (N.D. Cal. 1987) 16, 17

Street v. Honorable Second Court of Appeals, 756 S.W.2d 299 (Tex. 1988) 8

Tennessee Wheel & Rubber Co. v. Captron Corp. Air Fleet (In re Tennessee Wheel & Rubber Co.), 64 B.R. 721 (Bankr. M.D. Tenn. 1986). 19, 20

U.S. v. Redmond, 36 B.R. 932 (Bankr. D. Kan. 1984) 12

United Bank of Loves Park v. Dohm (In re Dohm), 14 B.R. 701 (Bankr. N.D. Ill. 1981). 15, 18

Williams v. Adams, 836 F.2d 958 (5th Cir. 1988) 6

Statutes:

11 U.S.C. §108. . . . . 5, 8, 11, 12, 13, 14, 15, 16, 17, 18, 22

11 U.S.C. §541. 15

11 U.S.C. §547. 19

11 U.S.C. §1101(1). 18

11 U.S.C. §1107(a). 18

Statutes, continued: Page

11 U.S.C. §1141 . . . . . 5, 12, 15, 16, 21

28 U.S.C. §1738 7

Rules:

Fed. R. Civ. P. 56 6

Tex. R. Civ. P. 166a 9

Books:

1B J. Moore, Moore's Federal Practice ¶0.416[3] (2d ed. 1991) 10

18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4433 (1981) 7

ABBREVIATION AND RECORD REFERENCES

Abbreviations

In this Brief, the following terms in quotation marks shall have the meaning as referenced:

"Respondents" refers to Seeligson, Douglass, Falconer & Vanden Eykel, P.C. and M.J. "Ike" Vanden Eykel, unless the context requires otherwise.

The "Besings" refers to Petitioners, Ray G. Besing and Ray G. Besing & Associates, P.C.

The "Plan" refers to the Besings Amended Joint Plan of Reorganization confirmed June 28, 1989.

For ease of reference the Bankruptcy Code will be referred to herein by section number and/or referred to as "the Code".

Record References

In this Brief, "Tr." references to the page number of the original record where the references matter may be found. Citations to the Record are to the original record pagination or listed in the bottom-right corner of the document.

"R. Exc." refers to the tab number of the Record Excerpts served by the Besings with their Brief to the United States Court of Appeals for the Fifth Circuit.

No. 91-2050

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAY G. BESING and RAY G.
BESING & ASSOCIATES, P.C.,

Petitioners,

v.

SEELIGSON, DOUGLASS, FALCONER
& VANDEN EYKEL, P.C.;
M.J. "IKE" VANDEN EYKEL;
THOMAS T. ROGERS;
LYNCH CHAPPEL, ALLDAY & ALSUP; and
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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON BEHALF OF RESPONDENTS SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, P.C. AND M.J. "IKE" VANDEN EYKEL

REPLY STATEMENT OF THE CASE

Failure to State Reasons for Grant of Writ

Petitioners' Statement of the Case fails to state any special or important reasons for this Honorable Court to grant the requested Writ of Certiorari.[1] Petitioner has

[1] Rule 10.1 of the Rules of the Supreme Court of the United States.

failed to show that the decision of the Fifth Circuit is in conflict with the decision of another United States Court of Appeals on the same matter, or that the Fifth Circuit has decided a federal question in any way in conflict with a state court of last resort; or that the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.[2] Petitioners have also failed to show that the decision of the Fifth Circuit decided an important question of federal law which has not been, but should be, settled by this Court, or that the Fifth Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court.[3] The Petitioners have failed to show these or any other special or important reasons why the requested writ should be granted.

Course of Proceedings Below

The course of proceedings below is adequately presented in the Besings' Petition, except as follows: (1) this appeal does not require a determination of the correct construction of §108(a) of the Code; and (2) the Bankruptcy Court did not decline to hear the case, but rather heard the case and granted summary judgment in favor of Respondents on the grounds of collateral estoppel.

---

[2] Rule 10.1(a) of the Rules of the Supreme Court of the United States.

[3] Rule 10.1(c) of the Rules of the Supreme Court of the United States.

Statement of Facts

Respondents deny the Besings' assertion, as fact, that Respondents' conduct was negligent and caused the striking of Besings' pleadings or the granting of a default judgment and summary judgment on Noble's counterclaim.

The Court should consider the following facts in addition to the facts presented in the Besings' Brief:

1. The Besings' Confirmed Joint Plan of Reorganization reserved to the bankruptcy estate only certain liens in Mr. Besing's homestead, an Austin condo, an automobile, and some IBM equipment. The Plan did not reserve the claim against Respondents.

2. The two Petitioners and the remaining Respondents in this cause of action are identical parties to those in a collateral action filed and decided in a Texas District Court of Dallas County, 68th Judicial District.

3. Petitioners have admitted in the State Court that Respondents' statute of limitations defense "turns on whether 11 U.S.C. §108, which operates to extend the period of limitations, is available to Plaintiffs as debtors in possession on September 19, 1989."

4. Petitioners' state court cause of action against Respondents has been dismissed with prejudice by the trial court and is a final judgment, pending the Petitioners' right to appeal.

REPLY STATEMENT OF THE ISSUES PRESENTED

REPLY ISSUE NO. 1:

AFTER CONFIRMATION OF THEIR CHAPTER 11 BANKRUPTCY PLAN OF REORGANIZATION, THE BESINGS BROUGHT SUIT IN STATE COURT AGAINST RESPONDENTS. AFTER AN ADVERSE DECISION BASED ON LIMITATIONS, THE BESINGS BROUGHT SUIT IN THE BANKRUPTCY COURT FOR A DETERMINATION OF THE SAME ISSUE AGAINST THE IDENTICAL PARTIES. DID THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY AFFIRM THE BANKRUPTCY COURT'S GRANT OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS OF COLLATERAL ESTOPPEL? (APPLICABLE TO PETITIONERS' ISSUE NUMBER 1).

REPLY ISSUE NO. 2:

WAS THE TOLLING PROVISION OF 11 U.S.C. §108(a) AVAILABLE TO PETITIONERS AT THE TIME THE STATE COURT SUIT WAS FILED? (APPLICABLE TO PETITIONERS' ISSUE NUMBER 2).

SUMMARY OF THE ARGUMENT

The Petitioners filed suit in state court against the Respondents. The Respondents filed a motion for summary judgment on the basis of limitations, and the state court granted it. The Petitioners appealed the state court summary judgment to a Texas court of appeals, and filed a declatory judgment suit in the Bankruptcy Court for a re-determination of the same limitations issue against the identical defendants. The Bankruptcy Court granted the Respondents' motion for summary judgment on the grounds of collateral estoppel based upon the state court decision, which the District Court and Court of Appeals affirmed.

A judgment is final for collateral estoppel purposes even if an appeal is pending, unless the appeal is a trial

de novo. An appeal of a summary judgment is not a trial de novo because the appellate court is limited to the record before it and does not "try the case as if the suit had been filed originally in that court." Accordingly, the Bankruptcy Court properly granted summary judgment based upon collateral estoppel, and the District Court and Court of Appeals properly affirmed.

Even if collateral estoppel did not apply, the Petitioners are clearly not entitled to the benefits of 11 U.S.C. §108. Section 108's tolling provision applies only to claims brought by trustees and debtors-in-possession. A mere debtor is not entitled to the benefits of §108 on a claim that reverts to him upon confirmation of his reorganization plan. The claims against Respondents were not explicitly reserved for the estate in the Petitioners' Plan. Therefore, pursuant to 11 U.S.C. §1141(b) of the Code, such claims vested in the Besings upon confirmation. Accordingly, §108 does not apply and the limitations period for the Petitioners' claim expired.

ARGUMENT AND AUTHORITIES

I.

AFTER CONFIRMATION OF THEIR CHAPTER 11 BANKRUPTCY PLAN OF REORGANIZATION, THE BESINGS BROUGHT SUIT IN STATE COURT AGAINST RESPONDENTS. AFTER AN ADVERSE DECISION BASED ON LIMITATIONS, THE BESINGS BROUGHT SUIT IN THE BANKRUPTCY COURT FOR A DETERMINATION OF THE SAME ISSUE AGAINST THE IDENTICAL PARTIES. DID THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY AFFIRM THE BANKRUPTCY COURT'S GRANT OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS OF COLLATERAL ESTOPPEL? (APPLICABLE TO PETITIONERS' ISSUE NUMBER 1).

The Bankruptcy Court, the District Court, and the Court of Appeals properly determined that Respondents were entitled to summary judgment as a matter of law because the competent summary judgment evidence demonstrated that the Petitioners are collaterally estopped from re-litigating identical issues that they have already litigated and lost in another court of competent jurisdiction.

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Williams v. Adams*, 836 F.2d 958, 960 (5th Cir. 1988). When the movant complies with Rule 56(c), summary judgment shall be granted. *Crocker Nat'l Bank v. Ideco Div. of Dresser Industries, Inc.*, 839 F.2d 1104, 1106 (5th Cir. 1988). The Court of Appeals should review the summary judgment record under the same standard as the lower court applied to determine that summary judgment was appropriate. *Bache v. AT&T*, 840 F.2d

283, 287 (5th Cir. 1988). In the present case, the Besings, as well as the Respondents, filed a motion for summary judgment (Tr. 361-73) and have raised no fact issues preventing summary judgment on the legal issues before the Court. (Tr. 467-72.) Accordingly, there is no genuine issue as to any material fact in the case at bar. By affirming the decisions of the Courts below, the Fifth Circuit Court of Appeals followed established precedent.

The Respondents' motion for summary judgment was granted in the Bankruptcy Court on the basis that a Texas state court, with the identical parties before it, had already decided the relevant issues. Pursuant to 28 U.S.C. §1738, a state court judgment is entitled to the same preclusive effect as it is given by the courts of that state. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986); *Migra v. Warner City School Dist.*, 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); *Rives v. Franklin Life Ins. Co.*, 792 F.2d 1324, 1328-29 (5th Cir. 1986).

In *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986), the Texas Supreme Court held that a final judgment, even if an appeal is pending, is final for collateral estoppel purposes in another action except in the unusual circumstances where the appeal is really a trial de novo. The Court's rationale was that, where identical parties and issues are involved, re-litigating an issue poses much greater danger that dismissing an action that may still be determined in the collateral cause. The Court stated, "Despite the manifest risks of resting preclusion on a judgment that is being appealed, the alternative of retrying the common claims, defenses, or issues is even worse." *Id.* at 6, *quoting* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4433 at 313 (1981).

The *Scurlock* court also emphasized the waste of the already overburdened judiciary's time caused by a retrial of identical issues between identical parties. 724 S.W.2d at 6.

Scurlock has routinely been applied in Texas since it was rendered. *See, e.g., Street v. Honorable Second Court of Appeals*, 756 S.W.2d 299 (Tex. 1988); *American General Fire and Casualty Co. v. Schattman*, 761 S.W.2d 582 (Tex. App. – Forth Worth 1988, no writ); *CLS Associates v. A.B.*, 762 S.W.2d 221 (Tex. App. – Dallas 1988, no writ) (applying *Scurlock* to bar prosecution of a legal malpractice claim where the underlying issues of services performed had already been adjudicated in a suit for attorneys fees).

The case at bar presents a classic example of collateral estoppel. The Texas court rendered summary judgment based upon the identical issue that the Besings sought to present to the Bankruptcy Court: the availability of the tolling provision of §108(a) of the Code to the Besings to extend the statute of limitations. Having litigated the identical issue between identical parties, the state court judgment, even though on appeal, collaterally estops the Bankruptcy Court from deciding the issue anew.

In the Court of Appeals, the Besings raised for the first time the claim that the elements of collateral estoppel are not met because the state court appeal is, in effect, a trial de novo. This argument was not raised or presented to either the Bankruptcy Court or the District Court and it is improper to raise it for the first time on appeal. *Frank C. Bailey Enterprises, Inc. v. Cargill, Inc.*, 582 F.2d 333, 334 (5th Cir. 1978) (per curiam).

Even if this Court were to consider the Besings' de novo argument, that argument must fail. The Besings

cite no authority for the naked assertion that the state court appeal is a trial de novo. (See Petition for Writ of Certiorari at 6.) The lack of authority is not surprising since it is clear that a review of a summary judgment by a Texas court of appeals is not a trial de novo:

> A de novo trial means "anew; afresh; in the same manner; with the same effect; a second time." 1B C.J., 486; 24 C.J.S., De novo, p. 1011. Power to try a case de novo vests a court with full power to determine the issues and rights of all parties involved, and to try the case *as if the suit had been filed originally in that court. Zurich General, etc. Co. v. Rodgers,* 128 Tex. 313, 97 S.W.2d 674, 675. From the above authorities we conclude that a de novo judicial trial means a *full civil trial on the facts as well as the law.*

Lone Star Gas Co. v. State, 153 S.W.2d 681, 692 (Tex. 1941) (emphasis added).

A review of a summary judgment is not a trial de novo under Texas law because a Texas court of appeals is restricted to considering only the evidence and issues raised by the parties in the trial court. *Medina v. El Paso Machine & Steel Works, Inc.,* 740 S.W.2d 99 (Tex. App. – El Paso 1987, no writ). *See also* Tex. R. Civ. P. 166a. (See Add. at 6.) In the trial court the parties may present whatever arguments and evidence they wish and can supplement with leave of court. Tex. R. Civ. P. 166a(f) & (g). On appeal, the parties can supplement neither their argument nor proof and are restricted to the matters raised in the court below. The court of appeals does not "try the case as if the suit had been filed originally in that court" and the appeal is therefore not a de novo trial. In general terms, an appeal from a normal trial court judgment is not considered a trial de novo. *CLS Associates v. A.B.,* 762 S.W.2d at 223.

Moreover, the federal standard for application of collateral estoppel is identical to the Texas standard. *E.g.*, *Prager v. El Paso Nat'l. Bank*, 417 F.2d 1111, 1112 (5th Cir. 1969). In determining whether an appeal constitutes a trial de novo, Professor Moore offers the following guidelines:

> If the appellate court is limited to consideration of the trial record and to affirming, reversing, vacating or modifying the judgment under review, the judgment . . . is entitled to collateral estoppel effect, until it is reversed, vacated or modified.

1B J. Moore, *Moore's Federal Practice* ¶ 0.416[3] at 522-23 (2d ed. 1991). Because a federal appeals court like a Texas court of appeals is limited to the summary judgment record and may only affirm, reverse, vacate, or modify the judgment below, a federal summary judgment that is on appeal is also entitled to preclusive effect.

The Besings cite the case of *Citibank N.A. v. Graphic Scanning Corp.*, 618 F.2d 222 (2d Cir. 1980), as analogous to the case at bar. *Citibank N.A. v. Graphic Scanning Corp.* is distinguishable on at least two grounds: first, it is decided under the law of New York, not Texas, and there is no showing that the two state standards for collateral estoppel are similar; and second, the court is construing the Communications Act, not the Bankruptcy Code. The Communications Act vests exclusive jurisdiction of the claim brought by Citibank in the federal courts or before the Federal Communications Commission. In the case at bar there is no exclusive jurisdiction of this matter in the Bankruptcy Court, as the District Court correctly noted in its opinion affirming the Bankruptcy Court.

This Court has said that state courts routinely, and properly, interpret the Bankruptcy Code and that their

decisions on those issues should be given preclusive effect under the doctrine of collateral estoppel. *Brown v. Felsen*, 442 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979). *See also Nix v. Zervas*, 92 B.R. 164 (Bankr. N.D. Tex. 1988). In *Brown v. Felsen*, this Court held:

> If, in the course of adjudicating a state law question, a state court should determine factual issues using standards identical to those of §17 [of the Bankruptcy Act], then collateral estoppel, in the absence of countervailing public policy, would bar re-litigation of those issues in the bankruptcy court.

442 U.S. at 139 n.10.

This reasoning is squarely in line with the facts in the case at bar. The state court had the identical parties before it, and decided the identical issue – Was 11 U.S.C. §108(a) available to the Besings to toll the applicable statute of limitations? Collateral estoppel bars re-litigation of that issue in the Bankruptcy Court and the Bankruptcy Court was correct in granting Appellees' motion for summary judgment based on collateral estoppel.

II.

WAS THE TOLLING PROVISION OF 11 U.S.C. §108(a) AVAILABLE TO PETITIONERS AT THE TIME THE STATE COURT SUIT WAS FILED? (APPLICABLE TO PETITIONERS' ISSUE NUMBER 2).

The Besings attempt to convince this Court that a Writ of Certiorari should be granted because they are entitled to the limitations extension of §108(a) of the Code as a matter of law. Respondents object to the inclusion of this argument as grounds for the writ since this issue was not reached or considered by either the Bankruptcy Court, the District Court, or the Court of Appeals. The decisions of the courts below were based

upon collateral estoppel. Nonetheless, subject to the foregoing objection, Respondents will address the Besings' argument concerning this section of the Code to demonstrate that no basis exists for granting the writ.

The Besings' argument regarding §108(a), while inventive, lacks merit. The §108(a) issue was instead correctly decided in the forum originally chosen by the Besings, the Texas state court. As a matter of law, the Besings were not entitled to the benefits of §108(a) on their claim for relief because (1) they were not debtors-in-possession when they brought suit and (2) this claim was not reserved in thier Plan of Reorganization.

Under §1141(b) of the Code, all property of a bankruptcy estate revests in the debtor on *the date of confirmation.* The bankruptcy courts have consistently held that confirmation of a plan of reorganization terminates debtor-in-possession status. *See In re Grinstead,* 75 B.R. 2 (D. Minn. 1985); *U.S. v. Redmond,* 36 B.R. 932 (Bankr. D. Kan. 1984). The tolling provisions of the Code have no application to a debtor post-confirmation, but are provided only to toll limitations in actions by a trustee (or debtor-in-possession) for the benefit of the estate. *In re Lawler,* 106 B.R. 943, 961 (Bankr. N.D. Texas 1989).

In *Redmond,* the court expressly rejected the proposition advanced by the Besings in this case: that the debtors continued to be debtors-in-possession because the estate was being administered and was not closed. The *Redmond* court held:

> Unless a reorganization plan provides otherwise, confirmation vests all of the property of the estate in the debtor and releases it from all claims and interests of creditors . . . .

> It is clear that upon confirmation of a plan of reorganization, property of the bankruptcy estate vests in the reorganized debtor, a new eneity, and administration of the estate ceases.

36 B.R. at 934.

In *Grinstead,* the court held that the debtors lost their debtor-in-possession status on the date that their Plan of Reorganization was confirmed, stating:

> The term "debtor in possession" is intended to refer to a debtor who *during thependency of a case prior to confirmation* retains property in the fiduciary of a trustee of the estate.
>
> Once a plan of reorganization is confirmed, the bankruptcy estate ceases to exist unless the plan specifically provides otherwise, and all estate property revests in the debtor subject to the terms and conditions imposed by the plan . . . . *There is no debtor-in-possession status of a debtor post confirmation.*

75 B.R. at 3 (emphasis added).

The Fifth Circuit Court of Appeals opinion in *Cunningham v. Healthco, Inc.,* 824 F.2d 1448 (5th Cir. 1987), squarely addresses the standing of a post-confirmation debtor/debtor-in-possession to assert the benefit of §108(a). In *Cunningham,* the Court held:

> While a debtor-in-possession is entitled to §108's tolling period, however, *a debtor is not* . . . Thus, the statute of limitations issue is distilled to the question of whether Dental Leasing was still a debtor-in-possession on July 2, 1984. If it was, then it would have been entitled to rely on §108's tolling of the limitations period . . . . On the other hand, if the reorganization period had ended and Dental

> Leasing had returned to "debtor" status, then §108's protection would not have been available to it . . . .

Id. at 1460 (emphasis added).

The Court then found that a post-confirmation debtor could obtain the benefits of §108 only if the plan of reorganization explicitly reserved any recovery of damages for the creditors. The *Cunningham* Court expressly found that the plan in that case contained the necessary reservation. Because of that explicit reservation for the benefit of creditors, the *Cunningham* Court held that the debtor was still entitled to assert the tolling provisions of §108(a) post-confirmation. *Id.* at 1460. While the debtor/debtor–in-possession distinction was clearly recognized in *Cunningham*, the determining factor was the reservation of the potential claim for the creditors in the plan.

The Besings' Plan, on the other hand, did not reserve the claim in the case at bar. Under Section 4.1, the Plan vests the Besings with all of the property in the Besing estates on the Effective Date of the Plan, except the liens described in Paragraph 3.4, 3.4.1, and 3.5.1. The liens described in paragraphs 3.4, 3.4.1, and 3.5.1 did not reserve the alleged causes of action against the Respondents, but related to interests in Mr. Besing's homestead, his Austin condominium, an automobile and some IBM equipment. The claims against the Respondents were not reserved for the Estate or the creditors, but vested in the Besings. Therefore, the Besings lost the status of debtor-in-possession and application of the §108 tolling provision. As a result, the Besings' claims against the Respondents are time-barred.

Other courts have agreed that the tolling provisions of §108 are not available to debtors. *Motor Carrier Audit &*

Collection Co. v. Lighting Products, Inc., 113 B.R. 424 (N.D. Ill. 1989); *Craig v. Barclays American Financial, Inc. (In re Craig)*, 7 B.R. 864 (Bankr. E.D. Tenn. 1980). In *United Bank of Loves Park v. Dohm (In re Dohm)*, 14 B.R. 701 (Bankr. N.D. Ill. 1981), the court rejected the contention that §108 would permit the debtors an extension of the redemption period under Illinois foreclosure law.:

> The Court has never been called upon previously to construe Section 108, but even if Section 108 were intended as authority for tolling a redemption period, it does not appear that it is available to debtors, but only to trustees. Surely, conflicts between trustees and debtors would arise if Section 108 were available to both.

Id. at 702. In any event, *Cunningham* is controlling on this issue and there is no reason for this Court to re-examine its well reasoned holding. *Cunningham* is not in conflict with the decisions of any other court.

The Besings argue that the Respondents' position is based on two erroneous premises: (1) that confirmation of the Besings' Plan terminated the bankruptcy estate and the administration thereof; and (2) that, because §1141(b) of the Code provides that confirmation of a plan operates to vest all property of the estate in the debtor free and clear of the claims of creditors, any recoveries from the suit filed after confirmation will benefit only the Besings, not the creditors. The Besings' argument misstates Respondents' position. Respondents have never asserted, nor do they believe, that the Bankruptcy Court does not still maintain jurisdiction over certain matters pertaining to the Besings' bankruptcy cases. The contention of the Respondents, based upon §541(a) of the Code (See Add. at 2) and by the cases

that have considered it, is that the Besings' claims against Respondents were the property of the bankruptcy estate prior to confirmation of the Plan. Upon confirmation, pursuant to §1141(a) the claims revested in the Besings because it was not explicitly retained by the bankruptcy estate in the Plan. Reservation of the claims in the Plan was the only method to preserve the benefits of §108(a).

Respondents have never taken the position that any recovery by the Besings would not benefit the creditors of the estate; rather, the position has been that the Plan itself must have reserved the claim for anyone to realize the benefits of §108(a). The Besings' glaring misstatement of Respondents' position can only be an attempt to obscure the flawed nature of the Besings' position.

The Besings further attempt to confuse the issue by stating that Respondents argue that actions of the nature brought by the Besings in the state court must be brought before confirmation. Respondents have taken no such position. Clearly this action could have been brought post-confirmation if the Besings had done what was necessary to preserve the claim: reserve it in the Plan. The Besings have made their own bed; they just do not want to lie in it.

Just as misplaced as their reasoning is the Besings' reliance on the cases cited to support their argument that they are entitled to the benefits of §108(a). Asserting that there is no distinction between a debtor and debtor-in-possession, the Besings rely upon the cases of *Seawinds Ltd. v. Nedlloyd Lines, B.V.*, 80 B.R. 181 (N.D. Cal. 1987); *Fanelli v. Hensley (In re Triangle Chemicals, Inc.)*, 697 F.2d 1280 (5th Cir. 1983); *Flying "S" Land & Cattle Co. v. Beaumont (In re Flying "S" Land & Cattle Co. Inc.)*, 71 B.R. 183 (Bankr. D. Nev. 1987); *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569 (Bankr.

N.D. Tex. 1986); and *In re Hargis*, 73 B.R. 622 (Bankr. N.D. Tex. 1987). None of these cases addresses the issue presented in the case at bar and squarely addressed and answered by *Cunningham*: after the date of confirmation of the plan of reorganization and where the plan does not reserve the claim to the estate, §108 is not available to a mere debtor.

It is also important to note that all of the cases relied upon by the Besings in their Brief were decided prior to *Cunningham*, including *Seawinds*, *Triangle Chemicals*, *Flying "S" Land & Cattle Co., Inc.*, *Chapel Gate*, and *Hargis*. Each of these cases is further distinguishable as set forth below.

In *Seawinds*, the distinction between the debtor-in-possession and the debtor is not an issue. Rather, the case involves unfair competition claims and the application of the Shipping Act of 1984. Specifically, the issue addressed by the *Seawinds* court was the applicability of §108(a) to the savings provision of the Shipping Act. In no way, shape or form was the debtor/debtor-in-possession distinction relevant to the court's decision. Ultimately, the *Seawinds* court decided that §108 did not apply and used the savings provision of the Shipping Act to hold that the suit was not timely. Since §108(a) was not a part of the *Seawinds* Court's decision, any interpretation of §108 is dictum and not binding on any court.

The issue addressed in *Flying "S" Land & Cattle Co.* was whether or not debtors-in-possession are entitled to the benefits of §108. That case decides, quite correctly, that a debtor-in-possession is entitled to the benefits of §108. However, the court does not address whether or not a post confirmation debtor is entitled to the privileges of §108. In fact, the court expressly recognizes

the debtor/debtor-in-possession distinction and accepts the proposition that §108 does not benefit debtors:

> The *Dickson, Craig,* and *Dohm* cases cited by Beaumont are not in point. These cases support the proposition that *debtors* are not entitled to the benefit of §108(a). Beaumont's reliance on these cases is misplaced because none of the cases cited involved *debtors in possession* as defined in 11 U.S.C. §1101(1), and having the rights, powers and duties prescribed in 11 U.S.C. §1107(a).

Flying "S" Land & Cattle Co., 71 B.R. at 185 (emphasis in original).

The cases of *Triangle Chemicals, Inc., Chapel Gate,* and *Hargis* are easily distinguishable from the case at bar in that the issue in each case was the procedure for an allowance of attorney's fees in bankruptcy cases. None of these cases addressed the application of §108 to post-confirmation debtors and all involved completely different policy considerations.

In support of their position that confirmation of the Plan of reorganization does not terminate the bankruptcy estate or its administration, the Besings rely on *Lombard-Wall, Inc. v. New York City Housing Development Corp. (In re Lombard-Wall, Inc.),* 44 B.R. 928 (Bankr. S.D.N.Y. 1984). While, as set forth above, Respondents have never taken the position that confirmation terminates the bankruptcy estate or its administration, *Lombard-Wall* is instructive because the plan of reorganization in that case specifically provided that the bankruptcy court would retain jurisdiction over any disputes which might arise in connection with the claims asserted by the Debtors therein. This is entirely consistent with the *Cunningham* rationale that the post-confirmation debtor loses the benefit of §108(a) unless the claim is specifically reserved in the plan of reorganization.

The Besings also place great reliance on the case of *Tennessee Wheel & Rubber Co. v. Captron Corp. Air Fleet (In re Tennessee Wheel & Rubber Co.)*, 64 B.R. 721 (Bankr. M.D. Tenn. 1986). Their reliance is misplaced. The Besings contend that *Tennessee Wheel* holds that the absence of a reservation of the claim in the plan is not fatal and then go on to allege that the plan in *Tennessee Wheel* did not reserve the claims to the jurisdiction of the bankruptcy court. Nothing could be further from the truth. In fact, the plan in *Tennessee Wheel* specifically reserved the claims set forth in *Tennessee Wheel*. The opinion states:

> The Plan called for retention of jurisdiction by the bankruptcy court, *inter alia*, to recover assets pursuant to 11 U.S.C. §§547 and 548 . . . .
>
> These adversary proceedings are the avoidance actions described in the disclosure statement and plan and preserved for the debtor by the plan and confirmation order.

Id. at 723-24.

The issues that are addressed in *Tennessee Wheel* are §547 preferences, and whether the debtor can maintain a preference action after confirmation. The Defendants in *Tennessee Wheel* asserted that the avoidance actions passed out of the estate pursuant to the provisions of the confirmed plan. The Court rejected the Defendant's contention, finding:

> This ground is baseless because the reorganized debtor is statutory successor in interest to the pre-confirmation debtor *and the plan of reorganization clearly contemplated retention of jurisdiction* by the bankruptcy court to complete the prosecution of these avoidance actions.

Id. at 727 (emphasis added).

Even though *Tennessee Wheel* can be distinguished on the grounds that it was decided pre-*Cunningham* and was based upon a preference action, the logic of *Tennessee Wheel* is entirely consistent with *Cunningham* and the position of the Appellees herein. If a claim is reserved in the plan of reorganization, then it can be asserted post-confirmation by the debtor and enjoy the benefits of the rights granted to debtors-in-possession. The Besings in this case simply did not do what *Tennessee Wheel* and *Cunningham* say they must do: reserve the claim in the Plan.

The remaining cases cited in the Besings' Petition are: *J.E. Jennings, Inc. v. Williams Carter Co. (In re J.E. Jennings, Inc.)*, 46 B.R. 167 (Bankr. E.D. Penn. 1985); and *Korvettes, Inc. v. Sanyo Electric, Inc. (In re Korvettes, Inc.)*, 42 B.R. 212 (Bankr. S.D.N.Y. 1984). Each of these cases is distinguishable from the case at bar in that all the cases involve claims of preferences of one type or another. However, each case is significant in that in each case the plan of reorganization specifically retained the jurisdiction of the bankruptcy court to determine the adversary proceedings at issue. For example, in *Jennings*, the Court found that:

> Reference to the plan and order confirming the plan in this case *indicate that the debtors* intended and *expressly provided for retention of jurisdiction* by the bankruptcy court over actions pending at the time of confirmation and actions commenced after the time of confirmation, and over any assets recovered as a result of these actions.

46 B.R. at 170 (emphasis added).

Jennings also confirms the legal position of Respondents in this case that all assets of the estate revest in the

debtor upon confirmation of a plan "if the plan does not contain language indicating otherwise". 46 B.R. at 170.

The Besings rely upon *Korvettes* for the proposition that the debtor may bring actions until two years after the filing of the bankruptcy petition. In the first instance the *Korvettes* decision is confined to preference actions. More significantly, that court held that:

> [A] debtor in possession should be able to bring preference actions until a reorganization case is confirmed, no matter how long that process naturally takes. If, however, a case is confirmed in less than two years, the debtor may bring these actions until the two-year period has elapsed, *so long as it has provided in the confirmation documents* that preference actions may be brought post confirmation.

Korvettes, 42 B.R. at 222-223 (emphasis added). Even the *Korvettes* Court therefore would not extend the statute of limitations unless the claim was expressly reserved in the plan of reorganization.

Interestingly, one case not cited or relied upon by the Besings in the Court of Appeals, or in their Petition to this Court, but cited in their brief to the District Court is the case of *Neptune World Wide Moving, Inc. v. Schneider Moving & Storage Co. (In re Neptune World Wide Moving, Inc.)*, 111 B.R. 457 (Bankr. S.D.N.Y. 1990). The Besings relied upon *Neptune* in the District Court in support of their proposition that "§1141(b) authorized the debtor to proceed with recovery actions post confirmation, when the plan retains the court's jurisdiction . . . . over actions pending at the time of confirmation and actions commenced after the time of confirmation . . . ." It is amazing that the Besings relied upon *Neptune* and instructive that they omitted it from the Brief to the

Court of Appeals and in their Petition to this Court. The issue before the Court in *Neptune* was the bankruptcy court's post-confirmation jurisdiction over the debtor's claim. The Court held that it had *no jurisdiction* over Neptune's claim because "the property of the estate has reverted to Neptune pursuant to 11 U.S.C. §1141(b), whereas the terms of its plan and confirmation order *do not provide* for retained jurisdiction to sustain post confirmation adversary proceedings". *Id.* at 464 (emphasis added).

Respondents suggest that the Court of Appeals properly followed the guidance of *Neptune*, as well as *Cunningham* and its progeny, and properly held that where a debtor fails to retain or reserve a claim in its plan of reorganization that said claim reverts to the property of the debtor and that the post confirmation debtor is not entitled to the benefits of §108(a).

CONCLUSION

The Bankruptcy Court propertly granted Respondents' Motion for Summary Judgment on the basis of collateral estoppel and the District Court and Court of Appeals properly affirmed the judgment of the Bankruptcy Court. The identical issues presented by the Besings to the Bankruptcy Court had been presented to a completent court of collateral jurisdiction. The identical parties were involved and the collateral court ruled against the Besings. As stated by U.S. District Judge Felsenthal in his order affirming the Bankruptcy Court, the "state court judgment is entitled to collateral estoppel" as well as a "basic notion of full faith and credit . . . ."

In the alternative, summary judgment for Respondents was appropriate on the merits because §108 of the Code

only grants an extension of the statute of limitations to the representative of the bankruptcy estate, be it a trustee or debtor-in-possession, and not to the post-confirmation reorganized debtor. The authorities cited by Respondents conclusively demonstrates that the "property", the alleged causes of action, belongs to the reorganized debtor and not the bankruptcy estate. Further, all the evidence needed to support this finding was not only uncontroverted, but was judicially admitted by Besing.

For the foregoing reasons, this Honorable Court should deny the Petition for Writ of Certiorari. The Court of Appeals decision was correct and in accordance with the law. No conflict exist with the decision of a state court of last resort. This case does not present any important questions of federal law that should be settled by this Court. Moreover, the issues in this Petition are so clear

cut against the Petitioners that costs should be taxed against the Besings and Respondents should have all other relief, at law or in equity, to which they are justly entitled.

Respectfully submitted,

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July 7, 1992

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that three true and correct copies of the foregoing instrument were forwarded to Petitioners, RAY G. BESING and RAY G. BESING & ASSOCIATES, P.C., by and through the attorney of record, Mr. Jamie Wall, 12222 Merit Drive, Suite 1430, Dallas, Texas 75251; Respondent, THOMAS T. ROGERS, by and through the attorney of record, Thompson and Knight, Mr. Schuyler B. Marshall, 3300 First City Center, 1700 Pacific, Dallas, Texas 75201; and Respondent, LYNCH, CHAPPEL, ALLDAY AND ALSUP, by and through the attorneys of record, Cowles & Thompson, Charles T. Frazier, Jr., 4000 NCNB Plaza, 901 Main Street, Dallas, Texas 75202 via first class mail on July 7, 1992.

Joe A. Byrom

(4)

No. 91-2050

Supreme Court, U.S.
FILED
JUL 17 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

RAY G. BESING and RAY G. BESING & ASSOCIATES, P.C.,

Petitioners,

v.

SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, a Professional Corporation; M.J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS; LYNCH CHAPPELL, ALLDAY & ALSUP; and SMALL, CRAIG & WERKENTHIN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON BEHALF OF RESPONDENTS THOMAS T. ROGERS AND SMALL, CRAIG & WERKENTHIN

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July 17, 1992

QUESTIONS FOR REVIEW

I. WHETHER THE FIFTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT AND BANKRUPTCY COURTS' RULINGS THAT PETITIONERS WERE COLLATERALLY ESTOPPED FROM RELITIGATING THE APPLICABILITY OF 11 U.S.C. § 108(a).

II. IF PETITIONERS WERE NOT COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUE, WHETHER THEIR CHALLENGE TO THE JUDGMENTS WOULD BE WITHOUT MERIT BECAUSE THE TOLLING PROVISION OF 11 U.S.C. § 108(a) WAS NOT AVAILABLE TO BESING AT THE TIME HIS STATE COURT SUIT WAS FILED SINCE HE WAS NO LONGER A DEBTOR-IN-POSSESSION AND HIS CONFIRMED PLAN OF REORGANIZATION DID NOT RETAIN THE CAUSF OF ACTION WITHIN THE BANKRUPTCY ESTATE.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

PETITIONERS

Ray G. Besing
Ray G. Besing & Associates, P.C.

RESPONDENTS

Thomas T. Rogers
Small, Craig & Werkenthin
Lynch, Chappell & Alsup, formerly Lynch, Chappell, Allday & Alsup
Seeligson & Steinberg, formerly Seeligson, Douglass, Falconer & Vanden Eykel, P.C.
M.J. "Ike" Vanden Eykel

COUNSEL FOR PETITIONERS

Jamie Wall

COUNSEL FOR RESPONDENTS

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Patricia A. Nolan
For Thomas T. Rogers and Small, Craig & Werkenthin

Brill, Sinex, Hohmann & Stephenson
Joe A. Byrom
Robert Clark
For Seeligson, Douglass, Falconer & Vanden Eykel, P.C. and M.J. "Ike" Vanden Eykel

Cowles & Thompson
Dwayne J. Hermes
Charley Frazier
For Lynch, Chappell, Allday & Alsup

OTHER INTERESTED PARTIES

Jack A. Moffitt, Jr., former counsel for Petitioners
Koons, Fuller, McCurley & Vanden Eykel, the firm with which M.J. "Ike" Vanden Eykel is now associated
Tom C. McCall
Henry Seeligson
John P. Falconer, Jr.
Paul T. Nipper, Jr.
Jimmy L. Verner, Jr.
Frank B. Lyon
C. Barry Osborne
J. Matthew Dow

None of the above-individuals are parties to this lawsuit; they are affiliated with the defendant law firms. Each has been named as an individual defendant in a new lawsuit brought by Petitioners involving the identical facts and allegations.

Schuyler B. Marshall

Counsel of Record
for Respondents

Thomas T. Rogers and
Small, Craig & Werkenthin

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PARTIES . . ii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

REASONS FOR DENYING THE WRIT 5

I. THE FIFTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT AND BANKRUPTCY COURTS' RULINGS THAT PETITIONERS WERE COLLATERALLY ESTOPPED FROM RELITIGATING THE APPLICABILITY OF 11 U.S.C. § 108(a) (APPLICABLE TO PETITIONERS' ISSUE NUMBER 1) 5

II. EVEN IF PETITIONERS WERE NOT COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUE, THEIR CHALLENGE TO THE JUDGMENTS WOULD BE WITHOUT MERIT BECAUSE THE TOLLING PROVISION OF 11 U.S.C. § 108(a) WAS NOT AVAILABLE TO PETITIONERS AT THE TIME THEIR STATE COURT SUIT WAS FILED SINCE THEY WERE NO LONGER A DEBTOR-IN-POSSESSION AND THE CONFIRMED PLAN OF REORGANIZATION DID NOT RETAIN THE CAUSE OF ACTION WITHIN THE BANKRUPTCY ESTATE. (APPLICABLE TO PETITIONERS' ISSUE NO. 2) 11

CONCLUSION 22

TABLE OF AUTHORITIES

CASES Page

In re Alabama Fuel Sales Co., 45 B.R. 365 (N.D. Ala. 1985) 12

Brown v. Felsen, 442 U.S. 127 (1979) 10

CLS Associates v. A.B., 762 S.W.2d 221 (Tex. App. -- Dallas 1988, no writ) 9

In re Chapel Gate Apartments, Ltd., 64 B.R. 569 (Bankr. N.D. Tex. 1986) 17

Citibank N.A. v. Graphic Scanning, Corp., 618 F.2d 222 (2d Cir. 1980) 9, 10

Cunningham v. Healthco, 824 F.2d 1448 (5th Cir. 1978) 13, 17, 19, 21

Flying "S" Land & Cattle Co. v. Beaumont, 71 B.R. 183 (Bankr. D. Nev. 1987) 17

Frank C. Bailey Enterprises, Inc. v. Cargill, Inc., 582 F.1d 333 (5th Cir. 1978) (per curiam) 7

In re Grinstead, 75 B.R. 2 (D. Minn. 1985) 12

In re Hargis, 73 B.R. 622 (Bankr. N.D. Tex. 1987) 17

Jennings, Inc. v. Williams Carter Co., 46 B.R. 167 (Bankr. E.D. Penn. 1985) 20

Korvettes, Inc. v. Sanyo Electric, Inc., 42 B.R. 212 (Bankr. S.D.N.Y. 1984) 20

In re Lawler, 106 B.R. 943 (N.D. Tex. 1989) 15

Lone Star Gas Co. v. State, 153 S.W.2d 681 (Tex. 1941) (emphasis added) 8

Medina v. El Paso Machine & Steel Works, Inc., 740 S.W.2d 99 (Tex. App.--El Paso 1987, no writ) 8

Natco Industries v. Federal Insurance Co., 69 B.R. 418 (S.D. N.Y. 1987) 19

Neptune World Wide Moving, Inc. v. Schneider Moving & Storage Co., 111 B.R. 457 (Bankr. S.D.N.Y. 1990) 20, 21

Nix v. Zervas, 92 B.R. 164 (Bankr. N.D. Tex. 1988) 10

Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986) 5

Prager v. El Paso Nat'l Bank, 417 F.2d 1111 (5th Cir. 1969) 6

Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986) 6

Seawinds Ltd. v. Nedlloyd Lines. B.V., 80 B.R. 181 (N.D. Cal. 1987) 17

Tennessee Wheel & Rubber Co. v. Captron Corp. Air Fleet, 64 B.R. 721 (Bankr. M.D. Tenn. 1986) 18, 19

U.S. v. Redmond, 36 B.R. 932 (D.Kan. 1984) 12

Zurich General, etc. Co. v. Rodgers, 128 Tex. 313, 97 S.W.2d 674 7

STATUTES AND CODES

11 U.S.C. § 108(a) 2, 3, 4, 5, 10, 11

11 U.S.C. §§ 547 and 548 18

11 U.S.C § 1141(b) 5, 21

28 U.S.C. § 1738 5

Tex. R. Civ. P. 166a 8

ABBREVIATIONS

In this Brief, the following terms in quotation marks shall have the meaning as referenced:

"Rogers" refers to Thomas T. Rogers and Small, Craig & Werkenthin collectively, who were Defendants below.

"Besing" or "Petitioners" refers to Ray G. Besing and Ray G. Besing & Associates, P.C. collectively, who were Plaintiffs below.

The "Plan" refers to Besing's Amended Joint Plan of Reorganization confirmed June 28, 1989.

For ease of reference, the Bankruptcy Code will be referred to herein by section number and/or referred to as "the Code".

No. 91-2050

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAY G. BESING and RAY G. BESING & ASSOCIATES, P.C.,

Petitioners,

v.

SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, a Professional Corporation; M.J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS; LYNCH CHAPPELL, ALLDAY & ALSUP; and SMALL, CRAIG & WERKENTHIN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON BEHALF OF RESPONDENTS THOMAS T. ROGERS AND SMALL, CRAIG & WERKENTHIN

STATEMENT OF THE CASE

This case does not present any issue which merits the attention of this Honorable Court. Petitioners do not

appeal from a decision which conflicts with any decision from another United States court of appeals or any decision on a federal question that conflicts with a Texas Supreme Court decision. Petitioners present no evidence that the lower courts departed from the accepted and usual course of judicial proceedings, and then do not present a federal question of first impression, either. This appeal concerns only the collateral estoppel effect of a summary judgment. Pursuant to Rule 10, Rules of the Supreme Court, the Petition therefore should be denied.

Course of Proceedings Below

The course of proceedings below is adequately presented in Petitioners' Brief, except that (1) this appeal would not require a determination of the correct construction or application of § 11 U.S.C. § 108(a) because Petitioners are collaterally estopped from raising these issues; and (2) the Bankruptcy Court did not decline to hear this case; it granted a summary judgment on grounds that Petitioners were estopped from relitigating their claim.

Statement of Facts

Rogers strenuously denies Petitioners' assertion that Rogers' conduct caused the striking of their pleadings or the granting of a default judgment and summary judgment as to the counterclaims in the Noble litigation.

The Court should consider the following facts in addition to the facts presented in Petitioners' Brief:

1. The Petitioners and the Respondents in this cause of action are identical parties to those in Besing's collateral state-court action, Case No. 90-7968-C, Texas District Court, Dallas County, 68th Judicial District. Indeed the District Court noted that the Petitions did "not challenge that the elements for collateral estoppel are met." (Section "C" of Petitioners' Appendix).

2. Besing's state-court action against Rogers has been dismissed with prejudice and is final, pending Besing's right to appeal.

3. Petitioners have admitted in the state-court action that Respondents' statute of limitations defense turned on whether 11 U.S.C. § 108, which operates to extend the period of limitations, was available to Plaintiffs as debtors in possession on September 19, 1989.

4. The state court found that neither Besing's Joint Plan of Reorganization nor the confirmation order reserved the malpractice action against Respondents in the bankruptcy estate.

SUMMARY OF THE ARGUMENT

Besing first filed suit in state court against Rogers and others, and summary judgments were granted on the basis of limitations. Besing appealed, and a Texas

court of appeals affirmed the summary judgments. Besing then appealed to the Texas Supreme Court, and that appeal is pending. While his state court action was pending, Besing filed suit in the Bankruptcy Court, seeking a redetermination of the same limitations issue against the identical defendants. The Bankruptcy Court granted Rogers and the other defendants summary judgment on the grounds of collateral estoppel (Section "D" of Petitioners' Appendix), and the District Court affirmed. (Section "C" of Petitioners' Appendix). On February 21, 1992, the United States Court of Appeals for the Fifth Circuit affirmed the bankruptcy and district courts' rulings, holding "that the prior state court judgment collaterally estopped Besing from relitigating the applicability of section 108(a)." (Section "A" of Petitioners' Appendix).

The state-court judgments against Besing are final for collateral estoppel purposes, even though an appeal is pending, because the appeal is not a trial de novo. An appeal of a summary judgment is not a trial de novo because the appellate court is limited to the record before it and does not "try the case as if the suit had been filed originally in that court." Accordingly, the Bankruptcy Court properly granted summary judgment based upon collateral estoppel, and the District Court and the Fifth Circuit properly affirmed.

Even if collateral estoppel did not apply, Besing would not be entitled to the benefit of 11 U.S.C. § 108 because its

tolling provision applies only to claims brought by trustees and debtors-in-possession. A mere debtor is not entitled to the benefit of Section 108 on a claim that reverts to the debtor upon confirmation of the debtor's plan of reorganization. The claims against Rogers and his codefendants were not explicitly reserved for the estate in Besing's Plan. Therefore, pursuant to 11 U.S.C. § 1141(b), such claims vested in Besing upon confirmation. Accordingly, Section 108 does not apply and the limitations period for Besing's claim expired.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT AND BANKRUPTCY COURTS' RULINGS THAT PETITIONERS WERE COLLATERALLY ESTOPPED FROM RELITIGATING THE APPLICABILITY OF 11 U.S.C. § 108(a) (APPLICABLE TO PETITIONERS' ISSUE NUMBER 1).

The Fifth Circuit, the District Court, and the Bankruptcy Court properly determined that Rogers was entitled to summary judgment as a matter of law because the competent summary judgment evidence demonstrated that Petitioners were collaterally estopped from relitigating issues identical to those which they had already litigated and lost in another court of competent jurisdiction. Pursuant to 28 U.S.C. § 1738, a state court judgment is entitled to the same preclusive effect in federal court as it is given by the courts of that state. E.g., Parsons

Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 525 (1986).

In Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986), the Texas Supreme Court brought Texas into conformity with federal law and held that a final judgment, even if an appeal is pending, is final for collateral estoppel purposes in another action except in the unusual circumstances where the appeal is really a trial de novo. The Court stated that "[d]espite the manifest risks of resting preclusion on a judgment that is being appealed, the alternative of retrying the common claims, defenses, or issues is even worse." Id. at 6 (quoting 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4433 at 313 (1981) and citing Prager v. El Paso Nat'l Bank, 417 F.2d 1111, 1112 (5th Cir. 1969)(the "fact that the judgment is now on appeal...has no effect on its absolute effect as a bar").

This case presents a classic example of collateral estoppel. Indeed, it is indisputable that the Texas court rendered summary judgment based upon the identical issue that Besing sought to present to the Bankruptcy Court: the availability of the tolling provision of Section 108(a) of the Code to extend the statute of limitations. Having litigated the identical issue between identical parties, the state court judgment, even though on appeal, collaterally estops the Bankruptcy Court from deciding the issue anew.

In the appeal to the Fifth Circuit, Besing for the first time raised the claim

that the elements of collateral estoppel are not met because the state court appeal is, in effect, a trial de novo. This argument was not raised or presented to either the Bankruptcy Court or the District Court and it is improper to raise it for the first time on appeal, as the Fifth Circuit noted.[1] Frank C. Bailey Enterprises, Inc. v. Cargill, Inc., 582 F.2d 333, 334 (5th Cir. 1978) (per curiam).

Even if Besing's de novo argument were considered, it must fail. Besing cites no authority for the naked assertion that the state court appeal is a trial de novo. This lack of authority is not surprising because the assertion is incorrect. The Texas Supreme Court has defined a trial de novo:

> A de novo trial means "anew; afresh; in the same manner; with the same effect; a second time." 18 C.J., 486; 25 C.J.S., De novo, p. 1011. Power to try a case de novo vests a court with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court. Zurich General, etc. Co. v. Rodgers, 128 Tex. 313, 97 S.W.2d 674, 675. From the above authorities we conclude that a de novo judicial trial means a full civil

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[1] Section "A" of Petitioners' Appendix at 4.

> trial on the facts as well as the law.

Lone Star Gas Co. v. State, 153 S.W.2d 681, 692 (Tex. 1941) (emphasis added).

As the Fifth Circuit held below, an appellate review of a summary judgment is not a trial de novo under Texas law because a Texas court of appeals is restricted to considering only the evidence and issues raised by the parties in the trial court. Medina v. El Paso Machine & Steel Works, Inc., 740 S.W.2d 99 (Tex. App.--El Paso 1987, no writ). In the trial court, the parties may present whatever arguments and evidence they wish and can supplement with leave of court. Tex. R. Civ. P. 166a(f) & (g).[2] On

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[2] The procedures governing summary judgments in Texas are set forth in Rule 166a, Tex. R. Civ. P. It provides, in relevant part:

> (f) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will

appeal, the parties can supplement neither their argument nor proof and are restricted to the matters raised in the court below. The court of appeals does not "try the case as if the suit had been filed originally in that court" and the appeal is therefore not a de novo trial. In general terms, an appeal from a normal trial court judgment is not considered a trial de novo. CLS Associates v. A.B., 762 S.W.2d 221, 223 (Tex. App. -- Dallas 1988, no writ).

Besing cites the case of Citibank N.A. v. Graphic Scanning, Corp., 618 F.2d 222 (2d Cir. 1980), as analogous to the case at bar. Citibank is distinguishable on at least two grounds: first, it is decided under the law of New York, not Texas, and there is no showing that the two state standards for collateral estoppel are similar; and second, the court is construing the Communications Act, not the

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not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Bankruptcy Code. The Communications Act vests exclusive jurisdiction of the claim brought by Citibank in the federal courts or before the Federal Communications Commission. In the case at bar there is no exclusive jurisdiction of this matter in the Bankruptcy Court, as the District Court correctly noted in its opinion affirming the Bankruptcy Court. (Section "C" of Petitioners' Appendix).

State courts routinely, and properly, interpret the Code and their decisions should be given preclusive effect under the doctrine of collateral estoppel. Brown v. Felsen, 442 U.S. 127 (1979); see also Nix v. Zervas, 92 B.R. 164 (Bankr. N.D. Tex. 1988). In Brown, this Court held that:

> If, in the course of adjudicating a state law question, a state court should determine factual issues using standards identical to those of § 17 [of the Bankruptcy Act], then collateral estoppel, in the absence of countervailing statutory policy, would bar re-litigation of those issues in the bankruptcy court.

Brown, 442 U.S. at 139 n.10.

The reasoning of Brown is squarely in line with the facts in this case. The state court had the identical parties before it and decided the identical issue -- whether 11 U.S.C. § 108(a) was available to Besing to toll the applicable statute of limitations. Collateral estoppel bars relitigation of that issue

in the Bankruptcy Court. The Bankruptcy Court therefore was correct in granting Rogers' motion for summary judgment based on collateral estoppel, and the District Court and the Fifth Circuit were correct in affirming it.

II. EVEN IF PETITIONERS WERE NOT COLLATERALLY ESTOPPED FROM RELITIGATING THE ISSUE, THEIR CHALLENGE TO THE JUDGMENTS WOULD BE WITHOUT MERIT BECAUSE THE TOLLING PROVISION OF 11 U.S.C. § 108(a) WAS NOT AVAILABLE TO PETITIONERS AT THE TIME THEIR STATE COURT SUIT WAS FILED SINCE THEY WERE NO LONGER A DEBTOR-IN-POSSESSION AND THE CONFIRMED PLAN OF REORGANIZATION DID NOT RETAIN THE CAUSE OF ACTION WITHIN THE BANKRUPTCY ESTATE. (APPLICABLE TO PETITIONERS' ISSUE NO. 2)

Besing attempts to convince this Court that he is entitled to the limitations extension of Section 108(a) of the Code as a matter of law. Besing's argument regarding Section 108(a) lacks merit, however. The Section 108(a) issue was correctly decided in the forum originally chosen by Besing, the Texas state court. As a matter of law, Besing was not entitled to the benefits of Section 108(a) on his claim for relief because (1) he was not a debtor-in-possession when he brought suit, and (2) this claim was not reserved in his Plan of Reorganization.

Section 1141(b) of the Code revests all property of a bankruptcy estate in the

debtor/reorganized entity on the date of confirmation, terminating the bankruptcy estate:

> Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

Bankruptcy courts have consistently determined that confirmation of a plan of reorganization terminates debtor-in-possession status. See, e.g., In re Grinstead, 75 B.R. 2 (D. Minn. 1985); In re Alabama Fuel Sales Co., 45 B.R. 365 (N.D. Ala. 1985); U.S. v. Redmond, 36 B.R. 932 (D.Kan. 1984).

In Redmond, the government was trying to collect post-confirmation taxes against the bankruptcy estate, and argued the same point offered by Besing: that the debtors had continued to be debtors-in-possession because the estate was being administered and was not closed. The court rejected this argument, holding that:

> Unless a reorganization plan provides otherwise, confirmation vests all of the property of the estate in the debtor and releases it from all claims and interests of creditors....It is clear that upon confirmation of a plan of reorganization, property of the bankruptcy estate vests in the reorganized debtor, a new entity, and administration of the estate ceases.

Redmond, 36 B.R. at 934.

The mandate of Section 1141(b) and the cases following it are clear and preclude Besing's contention that he was a debtor-in-possession, unless their plan of reorganization explicitly vested the property in question (the cause of action against Rogers) in someone other than the debtor.

In Cunningham v. Healthco, 824 F.2d 1448 (5th Cir. 1978), the Fifth Circuit addressed this issue in the identical context of whether the statute of limitations was tolled. The court first stated:

> While a debtor-in-possession is entitled to §108's tolling period, however, a debtor is not....Thus, the statute of limitations issue is distilled to the question of whether Dental Leasing was still a debtor-in-possession on July 2, 1984. If it was, then it would have been entitled to rely on §108's tolling of the limitations period...On the other hand, if the reorganization period had ended and Dental Leasing had returned to "debtor" status, then §108's protection would not have been available to it...

Id.[3] The Court then found that the plan

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[3] Besing asserts in his Petition that there is no distinction between a debtor and debtor-in-possession. However, this key quotation from the Fifth Circuit opinion clearly demonstrates that when a right has been granted such as a limitations tolling

of reorganization explicitly "contained a reservation of rights by the creditors in the event that [the debtor] recovered, by way of lawsuit, any damages from [the defendant]." Id. at 1452. Because of this explicit reservation of the cause of action for the benefit of creditors, the Court held that the debtor was still a debtor-in-possession post-confirmation:

> If confirmation of the reorganization plan did not vest [the debtor] with title to its causes of action, then [the debtor] was still a "debtor-in-possession," and therefore was entitled to the tolling provision of § 108.

Id. at 1460.

In the case at bar, the opposite is true: the Plan vests the Debtors (Besing) with all of the property on the Effective Date of the Plan. Section 4.1 of the Plan provides:

> Besing shall be vested with all property of the Besing Estate on the Effective Date, free and clear of any and all liens, claims, and encumbrances, save and except the liens described in Paragraph 3.4, 3.4.1, and 3.5.1.

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provision only to the trustee/debtor-in-possession, there is a significant distinction after a plan has been confirmed and a debtor-in-possession is "returned to 'Debtor' status."

Section 4.1 also "vest(s) in Besing P.C. free of all liens, claims and encumbrances" assets used by it to practice law, except for subjection to the liens described in Paragraph 3.5 of the Plan. It is uncontroverted that in the Plan, Besing and Besing P.C. "shall be vested with all property of the ... Estate".[4] Moreover, the reservations for the estate described in paragraphs 3.4, 3.4.1, 3.5.1 and 4.1 did not apply to or reserve the cause of action against Rogers; instead the reservations only applied to and reserved an interest in Besing's homestead, his Austin condominium, an automobile and some IBM equipment. See §§ 3.4, 3.4.1 and 2.5 of the Plan. Consistent with the Plan, Besing and Besing P.C. later instituted suit in their own name and not as debtors-in-possession.

In In re Lawler, 106 B.R. 943, 961 (N.D. Tex. 1989), the court held that the tolling provisions of the Bankruptcy Code have no application to a debtor post-confirmation, but are only provided to

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[4] Moreover, the plan of reorganization itself negates any interpretation of continued debtor-in-possession status. Indeed, under Article IV, "Implementation of Plan," it provides that on its effective date (3 days after confirmation, or July 1, 1989) "... each Debtor shall turnover all funds in the debtor-in-possession accounts to Besing P.C. and Besing." § 4.1. Thereafter in the plan, there is no reference whatever to a debtor-in-possession.

toll limitations in actions brought by a trustee (or debtor-in-possession) for the benefit of an estate. The court stated:

> Depending on the circumstances of the particular case, §29(e)[5] may limit or extend the time for a trustee to bring an action, but where the trustee does not bring the action, §29(e) does not help or hinder a debtor prosecuting a case on his own behalf; it simply does not apply....This provision tolls limitation of a creditor's claims, not the claims of a debtor suing in his own behalf. The Congressional purpose in enacting the section bears out this interpretation.

Id. at 960-61. Accordingly, the court found that the tolling provision of the Bankruptcy Act did not help or hinder the debtor prosecuting a case on his own behalf; it simply did not apply. Id.

Besing's Brief argues that Rogers' position is based on the erroneous premise that confirmation of the Plan terminated the bankruptcy estate and the administration thereof. Besing's arguments misstate Rogers' position. Rogers' contention, based upon Section 541(a) of the Code and the cases that have considered it, is that Besing's claims against Rogers were the property of the bankruptcy estate prior to confirmation of the Plan. Upon confirmation, pursuant to § 1141(a), the claims revested in Besing because they were not explicitly retained by the bankruptcy

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[5] The same provision as §108.

estate in the Plan. Reservation of the claims in the Plan was the only method to preserve the benefits of § 108(a).

Besing further attempts to confuse the issue by stating that Rogers argues that actions of the nature brought by Besing in the state court must be brought before confirmation. Rogers takes no such position. Clearly this action could have been brought post-confirmation if Besing had done what was necessary to preserve the claim: reserve it in the Plan.

Just as misplaced as his reasoning is Besing's reliance on the cases cited to support his argument that he is entitled to the benefits of Section 108(a). Asserting that there is no distinction between a debtor and debtor-in-possession, Besing relies upon Seawinds Ltd. v. Nedlloyd Lines, B.V., 80 B.R. 181 (N.D. Cal. 1987); Flying "S" Land & Cattle Co. v. Beaumont (In re Flying "S" Land & Cattle Co. Inc.), 71 B.R. 183 (Bankr. D. Nev. 1987); In re Chapel Gate Apartments, Ltd., 64 B.R. 569 (Bankr. N.D. Tex. 1986); and In re Hargis, 73 B.R. 622 (Bankr. N.D. Tex. 1987). None of these cases addresses the issue presented in the case at bar and squarely addressed and answered by Cunningham: after the date of confirmation of the plan of reorganization which does not reserve the claim to the estate, Section 108 is not available to a mere debtor. Furthermore, all of the cases relied upon by Besing were decided prior to Cunningham, including Seawinds, Triangle Chemicals, Flying "S" Land & Cattle Co., Chapel Gate, and Hargis.

Besing also places great reliance on the case of Tennessee Wheel & Rubber Co. v. Captron Corp. Air Fleet (In re Tennessee Wheel & Rubber Co.), 64 B.R. 721 (Bankr. M.D. Tenn. 1986). His reliance is misplaced, however. Besing contends that Tennessee Wheel holds that the absence of a reservation of the claim in the plan is not fatal and then goes on to allege that the plan in Tennessee Wheel did not reserve the claims to the jurisdiction of the bankruptcy court. Nothing could be further from the truth. In fact, the plan in Tennessee Wheel specifically reserved the claims set forth in Tennessee Wheel. The opinion states:

> The Plan called for retention of jurisdiction by the bankruptcy court, inter alia, to recover assets pursuant to 11 U.S.C. §§ 547 and 548....
>
> These adversary proceedings are the avoidance actions described in the disclosure statement and plan and preserved for the debtor by the plan and confirmation order.

Id. at 723-24.

The issues that are addressed in Tennessee Wheel are Section 547 preferences and whether the debtor can maintain a preference action after confirmation. The defendants in Tennessee Wheel asserted that the avoidance actions passed out of the estate pursuant to the provisions of the confirmed plan. The court rejected the defendants' contention, finding:

> This ground is baseless because the reorganized debtor is statutory successor in interest to the pre-confirmation debtor and the plan of reorganization clearly contemplated retention of jurisdiction by the bankruptcy court to complete the prosecution of these avoidance actions.

Id. at 727 (emphasis added).

Even though Tennessee Wheel can be distinguished on the grounds that it was decided pre-Cunningham and was based upon a preference action, its logic is entirely consistent with Cunningham and with Rogers' position. If a claim is reserved in the plan of reorganization, then it can be asserted post-confirmation by the debtor who can enjoy the benefits of the rights granted to debtors-in-possession. Besing simply did not do what Tennessee Wheel and Cunningham say he must do: reserve the claim in the Plan.

In Natco Industries v. Federal Insurance Co., 69 B.R. 418 (S.D. N.Y. 1987), the court rejected an argument like Besing's:

> the purpose of the two year extension granted by section 108 is to preserve the interests of the debtor's estate ... Thus, these courts have held that debtors acting in their own interests, such as plaintiffs, cannot invoke section 108, or its predecessor, Section 29(e).

Id. at 419 (cites omitted). It further ruled:

> If debtors were permitted to invoke section 108, they would reap the benefit of a provision designed to preserve the estate as a whole pending bankruptcy proceedings. Furthermore, permitting post-confirmation debtors to use the section would not only discourage debtors from bringing timely actions, but could act as an inducement for debtors and debtors-in-possession to neglect claims during bankruptcy proceedings, and only later assert them following confirmation, thereby defeating the interest of creditors ... for these reasons, plaintiffs may not invoke section 108 and their action therefore is time-barred.

Id. at 420 (cites omitted).

The remaining cases cited in Besing's Brief are Jennings, Inc. v. Williams Carter Co. (In re J. E. Jennings, Inc.), 46 B.R. 167 (Bankr. E.D. Penn. 1985), and Korvettes, Inc. v. Sanyo Electric, Inc. (In re Korvettes, Inc.), 42 B.R. 217 (Bankr. S.D.N.Y. 1984). Each of these cases is distinguishable from the case at bar in that they involve claims of preferences of one type or another. Moreover, the Korvettes case was reversed. 67 B.R. 730 (S.D. N.Y. 1986).

Interestingly, one case not relied upon by Besing in the appeal to this Court or to the Fifth Circuit, but cited in his brief to the District Court, is Neptune World Wide Moving, Inc. v. Schneider

Moving & Storage Co. (In re Neptune World Wide Moving, Inc.), 111 B.R. 457 (Bankr. S.D.N.Y. 1990). Besing relied upon Neptune in the district court in support of his proposition that "§ 1141(b) authorized the debtor to proceed with recovery actions post confirmation, when the plan retains the court's jurisdiction .... over actions pending at the time of confirmation and actions commenced after the time of confirmation ...." (Tr. 61). It is amazing that Besing relied upon Neptune below and instructive that he later omitted it. The issue before the Court in Neptune was the bankruptcy court's post-confirmation jurisdiction over the debtor's claim. The court held that it had no jurisdiction over Neptune's claim because "[t]he property of the estate has reverted to Neptune pursuant to 11 U.S.C. § 1141(b), whereas the terms of its plan and confirmation order do not provide for retained jurisdiction to sustain post confirmation adversary proceedings." Id. at 464 (emphasis added).

Rogers urges that this Court accept the decisions of Neptune, as well as Cunningham and it progeny, and confirm that where a debtor fails to retain or reserve a claim in its plan of reorganization, that claim reverts to the debtor and the post confirmation debtor is not entitled to the benefits of Section 108(a).

CONCLUSION

The Bankruptcy Court properly granted Rogers' Motion for Summary Judgment on the basis of collateral estoppel and the District Court and the Fifth Circuit properly affirmed that judgment. The identical issues presented by Besing to the Bankruptcy Court had been presented to a collateral court of competent jurisdiction. The identical parties were involved and the collateral court ruled against Besing.

In the alternative, summary judgment for Rogers was appropriate on the merits because Section 108 of the Code only grants an extension of the statute of limitations to the representative of the bankruptcy estate, be it a trustee or debtor-in-possession, and not to the post-confirmation reorganized debtor. For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Neither the collateral estoppel nor the limitations argument presents an issue of such significance that it would merit this Court's consideration. Pursuant to Rule 10, Rules of the Supreme Court, the Petition should be denied. Moreover, costs should be taxed against Besing, and Respondents should have all other relief, at law or in equity, to which they are justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that three true and correct copies of the foregoing instrument were forwarded to Petitioners, RAY G. BESING and RAY G. BESING & ASSOCIATES, P.C., by and through the attorney of record, Mr. Jamie Wall, 12222 Merit Drive, Suite 1430, Dallas, Texas 75251; Respondent, LYNCH, CHAPPELL, ALLDAY AND ALSUP, by and through the attorneys of record, Cowles & Thompson, Charles T. Frazier, Jr., 4000 NCNB Plaza, 901 Main Street, Dallas, Texas 75202; and Respondents, SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, P.C. AND M.J. "IKE" VANDEN EYKEL, by and through the attorneys of record Brill, Sinex & Stephenson, Mr. Joe A. Byrom, 3500 Bank One Center, 1717 Main Street, Dallas, Texas 75201 via first class mail on July 17, 1992.

Schuyler B. Marshall

Supreme Court, U.S.
FILED
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(5)

No. 91-2050

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAY G. BESING AND RAY G. BESING & ASSOCIATES, P.C., *Petitioners*

v.

SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, P.C.; M. J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS; LYNCH, CHAPPELL, ALLDAY AND ALSUP; AND SMALL, CRAIG & WERKENTHIN, *Respondents*

Brief in Opposition on Behalf of Respondent Lynch, Chappell, Allday and Alsup

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QUESTIONS PRESENTED

1. Whether a prior state court judgment holding that Petitioners did not have standing to invoke 11 U.S.C. §108(a) to extend limitations for filing a legal malpractice claim collaterally estopped Petitioners from re-litigating this very same issue before the U.S. Bankruptcy Court.

2. Whether the tolling provision of 11 U.S.C. §108(a) was available to Petitioners when they filed their lawsuit in state court after confirmation of their bankruptcy reorganization plan.

LIST OF PARTIES

1. Ray Besing
2. Ray G. Besing & Associates, P.C.
3. Counsel: Jamie Wall
   Dallas, Texas
4. Lynch, Chappell, Allday & Alsup
5. Counsel: Cowles & Thompson
   Dallas, Texas
6. Small, Craig & Werkenthin
7. Thomas T. Rogers
8. Counsel: Thompson & Knight
   Dallas, Texas
9. Seeligson, Douglass, Falconer & Vanden Eykel
10. M. J. "Ike" Vanden Eykel
11. Counsel: Brill, Sinex & Stephenson
    Dallas, Texas

None of the above-mentioned corporations have parent companies or subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

A. STATEMENT OF THE CASE 1

1. Court Proceedings and Disposition In Courts Below 2

2. Statement of Facts 2

B. REASONS FOR DENYING THE WRIT 4

1. No Important Issues Are At Stake 4

2. The Decision Properly Applies The Collateral Estoppel Doctrine 4

a. De Novo Exception Does Not Apply 5

b. The State Court Was Competent to Decide Section 108(a)'s Effect on the Malpractice Claims 8

3. The Tolling Provision of Section 108 Was Not Available To The Besings At The Time They Filed Their State Action 10

a. Because The Bankruptcy Estate Reverted To The Besings, They Were No Longer Debtors-In-Possession 10

b. The Tolling Provision Does Not Apply To Post-Confirmation Debtors 13

C. CONCLUSION 17

TABLE OF AUTHORITIES

Cases: Page

Citibank, N.A. v. Graphic Scanning Corp., 618 F.2d 222 (2nd Cir. 1980) 7

Cunningham v. Healthco, Inc., 824 F.2d 1448 (5th Cir. 1987) 11,12,13,14

In re Chapel Gate Apartments, Ltd., 64 B.R. 569 (Bkrtcy. N.D. Tex. 1986) 14

In re Chernicky, Cole Co., Inc., 67 B.R. 828 (Bkrtcy. W.D. Pa. 1986) 15

In re Corvettes, Inc., 42 B.R. 217 (Bkrtcy. S.D.N.Y. 1984) 15

In re Craig, 75 B.R. 864 (Bkrtcy. E.D. Tenn. 1980) 13,14

In re Dixon, 432 F.Supp. 752 (W.D.N.C. 1977) 13

In re Dohm, 14 B.R. 701 (Bkrtcy. N.D. Ill. 1981) 13

In re Grinstead, 75 B.R. 2 (Bkrtcy. D. Minn. 1985) 10,11,12,13

In re Hargis, 73 B.R. 622 (Bkrtcy. N.D. Tex. 1987) 14

In re Houtman, 568 F.2d 651, 3 B.C.D. 1403 (9th Cir. 1978) 9

In re J.E. Jennings, Inc., 46 B.R. 167 (Bkrtcy. Pa. 1985) 15

In re Lawler, 106 B.R. 943, 961 (N.D. Tex. 1989) 10,13

In re Rudd, 104 B.R. 8 (Bkrtcy. N.D. Ind. 1987) 9

In re Santa Fe Development & Mortgage Corp., 16 B.R. 165 (1981) 17

In re T.C.I., Ltd., 21 B.R. 876 (1982) 17

In re Tennessee Wheel and Rubber Co., 64 B.R. 721 (Bkrtcy. Tenn. 1986) 16

In re Triangle Chemicals, 697 F.2d 1280 (5th Cir. 1983) 14

Johnny C. Ivy Plumbing Co. v. Keyser, 601 S.W.2d 158 (Tex. Civ. App. – Waco 1980, no writ) 6

Leslie v. Houston Natural Gas Corp., 280 S.W.2d 353 (Tex. Civ. App. – Galveston 1955, writ ref'd n.r.e.), *cert. denied*, 352 U.S. 829 (1956) 5

Lone Star Gas Co. v. State, 137 Tex. 279, 153 S.W.2d 681 (1941) ... 6

TABLE OF AUTHORITIES (Continued)

Cases (continued): Page

Matter of Brady, Texas, Municipal Gas Corp., 936 F.2d 212 (5th Cir.), *cert. denied sub nom. Sanders v. City of Brady, Tex.*, ___ U.S. ___ 112 S.Ct. 657 (1991) 9

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 5

Prager v. El Paso National Bank, 417 F.2d 1111 (5th Cir. 1969) ... 5

Richmond Trust v. Kutner, 504 S.W.2d 539 (Tex. Civ. App. – Dallas 1973, writ ref'd n.r.e.) 6

Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986) 5

Seawinds Limited v. Nedlloyds Lines, B.V., 80 B.R. 181- (N.D. Cal. 1987) 16

U.S. v. Redmond, 36 B.R. 932 (D. Kan. 1984) 10,11

Welder v. Fritz, 750 S.W.2d 930 (Tex. App. – Corpus Christi 1988, orig. proceeding) 6

Zurick General, etc., Co. v. Rogers, 128 Tex. 313, 97 S.W.2d 674 (1936) 6

Statutes and Rules:

11 U.S.C. §108(a) 2,3,4,5,8-11,13,14,16,17

11 U.S.C. §547 14,15

11 U.S.C. §548 14,15

11 U.S.C. §549 14,15

11 U.S.C. §1107(a) 15

11 U.S.C. §1141(b) 10,11,12,16,17

28 U.S.C. §1334(a) 9

28 U.S.C. §1334(b) 9

28 U.S.C. §1738 9

Tex. Gov't. Code Ann. §22.220 (Vernon 1988) 5

Tex. Gov't. Code Ann. §22.221 (Vernon 1988) 6

Tex. R. Civ. P. 166a(c) 6

TABLE OF AUTHORITIES (Continued)

Texas Constitution: Page

Tex. Const. Art. 5, §6 5

Other Authorities:

18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4416 at 137-138 (1981) 5

Restatement (Second) of Judgments §28(3) (1982) 8

No. 91-2050

IN THE

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OCTOBER TERM, 1991

RAY G. BESING AND RAY G. BESING & ASSOCIATES, P.C., *Petitioners*

v.

SEELIGSON, DOUGLASS, FALCONER & VANDEN EYKEL, P.C.; M. J. "IKE" VANDEN EYKEL; THOMAS T. ROGERS; LYNCH, CHAPPELL, ALLDAY AND ALSUP; AND SMALL, CRAIG & WERKENTHIN, *Respondents*

Brief in Opposition on Behalf of Respondent Lynch, Chappell, Allday and Alsup

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Lynch, Chappell, Allday & Alsup respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's unreported opinion which appears in Section A of the Appendix to the Petition for Writ of Certiorari.

A. STATEMENT OF THE CASE

This case was presented to the Fifth Circuit on the basis that the district court erred in affirming the bankruptcy court's summary judgment in favor of Respondents on collat-

eral estoppel grounds. Each Respondent's motion for summary judgment before the bankruptcy court urged that a prior state court judgment holding that Petitioners' legal malpractice claim against Respondents was barred by limitations collaterally estopped them from seeking the same relief again.

1. Court Proceedings and Disposition In Courts Below:

Lynch generally agrees with Petitioners' description of the course of proceedings below, except that this appeal does not involve the correct construction of section 108(a) of the Bankruptcy Code.

Ray G. Besing and Ray G. Besing & Associates, P.C. (the "Besings") brought a declaratory judgment action on September 19, 1989, in the United States Bankruptcy Court for the Northern District of Texas ("the bankruptcy court") seeking a determination that they were debtors-in-possession and thus entitled to rely on the tolling provisions of the Bankruptcy Code. (R. 239-242.) The bankruptcy court denied the Besings' Motion for Summary Judgment and granted all of the Respondents' Motions for Summary Judgment, holding that the Besings were collaterally estopped from raising this issue because a Texas district court had previously ruled on the very same issue in a suit involving identical parties. (R. 575-576; 284; 361; 375; 388; 467; 473; 533.) The federal district court and the Fifth Circuit affirmed the summary judgment on the same collateral estoppel grounds. (R. 211-214; Petitioners' Appendix A.)

2. Statement of Facts:

Lynch vehemently denies the Petitioners' statements as fact that Lynch's legal representation was in any way negligent, caused the Besings' pleadings to be struck and/or caused the rendition of a default judgment and summary judgment with regard to Noble's counterclaims. (Petition at 3.)

The Besings filed their petitions in bankruptcy on March 25, 1988. (R. 241.) The Besings' Joint Plan of Reorganization was confirmed on June 28, 1989. (*Id.*). The Confirmed Joint Plan of Reorganization expressly revested all property of the bankruptcy estate in the Besings as Debtors, other than Besing's homestead, an Austin condominium, an automobile and some IBM equipment. (*See* Appellants' Record Excerpt No. 7 at 12 – Confirmed Joint Plan of Reorganization, filed in the Bankruptcy Cases Nos. 388-031749 and 388-31750, styled "In Re: Ray G. Besing & Associates, P.C." and "In Re: Ray G. Besing.")

The Besings brought a lawsuit in the 68th Judicial District Court of Dallas County, Texas ("the state action") on September 19, 1989, alleging professional negligence and malpractice on the part of the Respondents, all attorneys or law firms who previously represented the Besings during the course of litigation with Mr. Besing's former fiancee. (R. 295-307.) Each Respondent filed motions for summary judgment on statute of limitations grounds. (R. 318-330; 420-425; 492-500; 533-542.) The state district court properly held that the Besings' cause of action was barred by the statute of limitations, as they were no longer debtors-in-possession and entitled to the tolling provision of the Bankruptcy Code. The court entered an interlocutory summary judgment for five of the Appellees, which later became final through severance. (R. 284-359; 354-355; 356-357; 358-359).

In the state action, the Besings admitted that the Respondents' statute of limitations defense "turns on whether 11 U.S.C. §108(a), which operates to extend the period of limitations, is available to Plaintiffs" as debtors-in-possession on September 19, 1989. (R. 338.) The state court thereafter denied the Besings' Motion for Rehearing and Motion for Abatement and affirmed the summary judgments. (R. 356-357.) The Besings then filed a Motion for New Trial with the

state district court. The state district court allowed the motion to be overruled by operation of law and the judgments became final.

The state court judgment in favor of Lynch is final, pending the Besings' Application for Writ of Error to the Texas Supreme Court.

B. REASONS FOR DENYING THE WRIT

1. No Important Issues Are At Stake:

The Fifth Circuit's opinion reflects that this case presents an elementary example of collateral estoppel. Notwithstanding the final judgment before a court of competent jurisdiction on Petitioners' standing to invoke the tolling provision of section 108(a), Petitioners nevertheless proceeded to seek adjudication on the exact issue in the U.S. Bankruptcy Court. The facts in this case are hardly unique, and the application of the collateral estoppel doctrine was so clear the Fifth Circuit decided its opinion has no precedential value.

2. The Decision Properly Applies The Collateral Estoppel Doctrine:

Petitioners presented and lost this same issue three times in the 68th District Court of Dallas County, Texas. The state court rejected the Besings' tolling argument and found limitations had run in its rulings on Respondents' Motions for Summary Judgment and on the Besings' Motion for Rehearing. (R. 533-542; 354-359.) Accordingly, the Fifth Circuit correctly held the bankruptcy court properly granted Lynch's Motion for Summary Judgment and denied the Besings' Motion for Summary Judgment. (R. 575-576.)

The elements of collateral estoppel are: (1) the same issue is involved in both actions, (2) the issue was actually litigated in the first action after a full and fair opportunity for litigation,

(3) the issue was actually and finally decided, (4) it was necessary to decide the issue in disposing of the first action, (5) the later litigation is between the same parties or involves non-parties that are subject to the binding effect or benefit of the first action, (6) the role of the issue in the second action was foreseeable in the first action, and (7) there are no special considerations of fairness, relative judicial authority, or changes of the law that warrant remission of the ordinary rules of preclusion. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §4416 at 137-138 (1981). Petitioners do not contest the fulfillment of these requirements; rather, they argue that two exceptions apply.

a. De Novo Exception Does Not Apply:

In *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986), the Texas Supreme Court held that a final judgment of a collateral court, even if an appeal is pending, is final for collateral estoppel purposes in another action except in the unusual circumstance where the appeal is essentially a trial de novo. *Id.* at 6. *See Prager v. El Paso National Bank*, 417 F.2d 1111, 1112 (5th Cir. 1969). The Besings alleged in the Fifth Circuit for the first time that the appeal of the state action is actually a trial de novo. They argued that the state appellate court must "itself interpret and construe section 108(a) anew, unrestricted by any presumption or deference favoring the trial court." While noting it ordinarily does not consider issues not raised in the courts below, the Fifth Circuit properly concluded that such argument is entirely without merit.

The Besings ignore the fact that, except in the limited circumstances provided by statute, the jurisdiction of Texas intermediate courts of appeals is exclusively appellate. Tex. Const. Art. 5, §6; Tex. Gov't. Code Ann. §22.220 (Vernon 1988); *Leslie v. Houston Natural Gas Corp.*, 280 S.W.2d 353,

360 (Tex. Civ. App. – Galveston 1955, writ ref'd n.r.e.) *cert. denied*, 352 U.S. 829 (1956). Intermediate appellate courts in Texas only have original jurisdiction to issue writs necessary to enforce their jurisdiction, and writs regarding mandamus, prohibition and habeas corpus. Tex. Gov't. Code Ann. §22.221 (Vernon 1988); *Welder v. Fritz*, 750 S.W.2d 930, 932 (Tex. App. – Corpus Christi 1988, orig. proceeding).

When reviewing a summary judgment, the appellate court must determine whether the evidence before the trial court was sufficient to support a party's claim and/or defense as a matter of law. Tex. R. Civ. P. 166a(c); *Johnny C. Ivy Plumbing Co. v. Keyser*, 601 S.W.2d 158, 160 (Tex. Civ. App. – Waco 1980, no writ); *Richmond Trust v. Kutner*, 504 S.W.2d 539, 541 (Tex. Civ. App. – Dallas 1973, writ ref'd n.r.e.) Accordingly, the appellate court's review of the district court's summary judgment in this case was not a trial de novo – an exercise of original jurisdiction – but an appellate review of the trial court's judgment in lieu of the record before it.

Texas courts have defined a trial de novo as follows:

> A de novo trial means "anew; afresh; in the same manner; with the same effect; a second time." 18 C.J., 486; 25 C.J.S., De novo, p. 1011. Power to try a case de novo vests a court with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court. *Zurich General, etc., Co. v. Rodgers*, 128 Tex. 313, 97 S.W.2d 674, 675. From the above authorities we conclude that a de novo judicial trial means a full civil trial on the facts as well as the law.

Lone Star Gas Co. v. State, 137 Tex. 279, 153 S.W.2d 681, 692 (1941). Because the Dallas Court of Appeals did not exercise original jurisdiction over the Besings' negligence and malprac-

tice causes of action, the Besings' argument that the trial de novo exception to the collateral estoppel rule is without merit.

Moreover, the Besings' continued analogy to *Citibank, N.A. v. Graphic Scanning Corp.*, 618 F.2d 222 (2nd Cir. 1980) is misplaced. In *Citibank*, a New York state court awarded Graphic Scanning partial summary judgment regarding collection of unpaid fees from Citibank. *Id.* at 225. In that action, Citibank pleaded the affirmative defense of illegality, alleging that Graphic Scanning was in violation of the Federal Communications Act. *Id.* The state court disposed of that matter by summary judgment "without taking any proof of facts" and expressing only "a conclusion of law." *Id.*

The Second Circuit Court of Appeals held that the state court action was not binding upon the Federal Communications Commission ("FCC") in determining whether Graphic Scanning was a common carrier as defined by the FCC. *Id.* The court, applying New York law, simply held that a state court in a later case "would not consider itself precluded from trying the underlying facts which affect the legal conclusion previously determined" on the summary judgment motion. *Id.* (Citations omitted.) The Besings failed to note in their Brief that the court in *Citibank* expressly held that the issues in the state action and in the federal action were *not* identical. *Id.* Accordingly, the court properly held that the prior decision did not necessarily render for all time that Graphic Scanning was not a common carrier and therefore not obligated to follow the tenets of the Federal Communications Act. *Id.* at 225-226. Nowhere in the *Citibank* opinion does the court hold that the judgment of the state action was not final with regard to any of the issues presented before it.

b. The State Court Was Competent to Decide Section 108(a)'s Effect on the Malpractice Claims:

Likewise, the Besings' claim that the exception to the collateral estoppel rule relating to the allocation of jurisdiction is groundless. They base this argument upon section 28(3) of the Restatement (Second) of Judgments. This section provides, in part:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . .
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them. . . .

Restatement (Second) of Judgments §28(3)(1982).

Comment (e) to section 28 reveals that the latter half of exclusion (3) concerns a state court's determination of a matter that is within exclusive jurisdiction of the federal court. The Besings argue that because bankruptcy law is not the "bailiwick" of the state court, the application of section 108(a)'s tolling provision should be left to the federal court. The Besings concede that the state court does have jurisdiction to interpret the application and effect of section 108 upon their state action. Accordingly, their argument is inherently inconsistent. If state courts are not able to apply various aspects of federal law in a lawsuit that does not expressly fall within the exclusive jurisdiction of the federal courts, then any party not satisfied with a state court's ruling would be permitted to immediately file the same claim anew in federal court. This, of course, would emasculate the doctrine of collateral estoppel

and would result in needless, repetitive litigation. *See* 28 U.S.C. §1738.

The federal district courts have original and exclusive jurisdiction "of all cases under title 11." 28 U.S.C. §1334(a). The district court's jurisdiction, however, is original but not exclusive "of all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. §1334(b). The civil proceeding at issue is a negligence and malpractice cause of action that the Besings chose to file in state court. Their suit does not arise under title 11 nor is it necessarily connected thereto. The only connection with federal law is Lynch's affirmative defense of limitations, which necessarily involves the interpretation of the bankruptcy tolling provision. This determination does not involve the exclusive and/or original jurisdiction of the federal district courts. The only cases acknowledging Congress' intent to vest bankruptcy courts with exclusive jurisdiction because of their special competence involve proceedings on the discharge of debts. *See In re Rudd*, 104 B.R. 8 (Bkrtcy. N.D. Ind. 1987); *In re Houtman*, 568 F.2d 651, 3 B.C.D. 1403 (9th Cir. 1978). The Fifth Circuit has noted that "the only aspect of the bankruptcy proceeding of which the districts and their bankruptcy units have exclusive jurisdiction is 'the bankruptcy petition itself.'" *Matter of Brady, Texas, Municipal Gas Corp.*, 936 F.2d 212, 218 (5th Cir.), *cert. denied sub nom. Sanders v. City of Brady, Tex.*, ___ U.S. ___ 112 S.Ct. 657 (1991). Accordingly, the Fifth Circuit properly held that the state court's ruling on the application of section 108(a) is not a matter within the exclusive jurisdiction of the bankruptcy court and, therefore, does not fall within the allocation of jurisdiction exception to collateral estoppel.

3. The Tolling Provision of Section 108 Was Not Available To The Besings At The Time They Filed Their State Action:

Both the Fifth Circuit and the district court did not address the substantive issue of whether the Besings were entitled to the tolling provisions of section 108(a) when they filed their malpractice claim in state court. Nevertheless, both the Besings and Lynch raised this substantive issue before both courts. Thus, this substantive issue will have to be addressed if writ is granted in this case.

a. Because The Bankruptcy Estate Reverted To The Besings, They Were No Longer Debtors-In-Possession:

Pursuant to Chapter 11 of the Code, all property of a bankruptcy estate reverts in the debtor on *the date of confirmation*.

> Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

11 U.S.C. §1141(b). Bankruptcy courts have consistently held that confirmation of a plan of reorganization terminates debtor-in-possession status. *See, e.g., In re Grinstead*, 75 B.R. 2 (Bkrtcy. D. Minn. 1985); *U.S. v. Redmond*, 36 B.R. 932 (D. Kan. 1984). The tolling provisions of the Code have no application to a debtor post-confirmation, but are provided only to toll limitations in actions by a trustee (or debtor-in-possession) for the benefit of the estate. *In re Lawler*, 106 B.R. 943, 961 (N.D. Tex. 1989).

In *Grinstead*, the court held that the debtors lost their debtors-in-possession status on the date their Plan of Reorganization was confirmed.

> The term "debtor-in-possession" is intended to refer to a debtor who *during the pendency of a case prior to confirmation retains* property in the fiduciary capacity of a trustee of the estate. Once a plan of reorganization is confirmed, the bankruptcy estate ceases to exist unless the plan specifically provides otherwise, and all estate property revests in the debtor subject to the terms and conditions imposed by the plan. *There is no debtor-in-possession status of a debtor post-confirmation.*

Grinstead, 75 B.R. at 3 (citations omitted) (emphasis added).

In *Redmond*, the court rejected the position that the debtors continued to be debtors-in-possession because the estate was being administered and was not closed. In so doing, the Court held:

> Unless a reorganization plan provides otherwise, confirmation vests all of the property of the estate in the debtor and releases it from all claims and interest of creditors. . . . It is clear that upon confirmation of a plan of reorganization, property of the bankruptcy estate vests in the organized debtor, a new entity, and administration of the estate ceases.

Redmond, 36 B.R. at 934 (citations omitted).

Section 1141(b) and the cases interpreting it dispose of Petitioners' position that they were debtors-in-possession unless their plan of reorganization expressly vested the claim against Lynch in someone other than the debtor. In *Cunningham v. Healthco, Inc.*, 824 F.2d 1448 (5th Cir. 1987), the court addressed this issue, finding that the plan of reorganization explicitly "contained a reservation of rights by the creditors in the event that [the debtor] recovered, by way of lawsuit, any damages from [the defendant]." *Id.* at 1452. Because of this express reservation for the benefit of creditors, the court held

that the debtor was still a debtor-in-possession post confirmation. *Id.* at 1460.

In this case, however, section 4.1 of the Plan expressly vests the Debtors (the Besings) with *all* of the property in the Besing Estate on the Effective Date of the Plan except the liens described in paragraphs 3.4, 3.4.1, and 3.5.1 therein. (The Plan at 12-13 – Appellants' R. Exc. No. 7.) Those liens described in Paragraph 3.4, 3.4.1, and 3.5.1 did *not* reserve the cause of action against any of the Respondents in this case, but related to interests in Besing's homestead, his Austin condominium, an automobile and some IBM equipment. (*Id.* at 9-11.) The alleged cause of action against Lynch was not reserved for the Estate, but vested in the Besings. Indeed, the Plan negates any interpretation of continued debtor-in-possession status for the Besings. Article IV of the Plan provides that on its Effective Date (3 days after confirmation, or July 1, 1989) "each *Debtor* shall turnover all funds in the *debtor-in-possession* accounts to Besing P.C. and Besing." (*Id.* at 12.) (Emphasis added.) Accordingly, the Besings lost the status of debtor-in-possession. *In re Grinstead*, 75 B.R. at-3.

As did the state courts, the bankruptcy court also found that the Besings were a reorganized entity rather than a trustee/debtor-in-possession who is not entitled to the tolling provisions of the Code. At the oral argument on the parties' motions for summary judgment in the bankruptcy court, the court repeatedly stated that the Besings were "not before the Court as a debtor-in-possession." (Tr. 17: 13-19; 8:25-9: 1.) Furthermore, the bankruptcy court further recognized that section 1141(b) provides that "as soon as a plan is confirmed, a property leaves a debtor-in-possession and goes back to the debtor." (*Id.* at 10:23-25.)

b. The Tolling Provision Does Not Apply To Post-Confirmation Debtors:

In *In re Lawler*, 106 B.R. 943 (N.D. Tex. 1989), the court held that the tolling provisions of the Code have no application to a debtor post-confirmation, but are only provided to toll limitations in actions brought by the trustee (or debtor-in-possession) for the benefit of the estate. *Id.* at 961. The Besings argue that no distinction exists between a debtor and debtor-in-possession. However, Judge Fish's opinion in *In re Lawler* clearly demonstrates that because the limitations tolling provision applies *only* to the trustee/debtor-in-possession, there most definitely is a significant distinction after plan has been confirmed and a debtor-in-possession is returned to "debtor" status.

Indeed, where a trustee or debtor-in-possession does not bring the action, section 108, "does not help or hinder a debtor prosecuting a case on his own behalf; it simply does not apply." *Id.* Moreover, the Fifth Circuit has expressly held that "[w]hile a debtor-in-possession is entitled to section 108(a)'s tolling period, however, a debtor is not." *Cunningham*, 824 F.2d at 1460 (citing *In re Dixon*, 432 F.Supp. 752, 756 (W.D.N.C. 1977); *In re Dohm*, 14 B.R. 701, 702 (Bkrtcy. N.D. Ill. 1981); *In re Craig*, 75 B.R. 864, 866 (Bkrtcy. E.D. Tenn. 1980)). *See also Grinstead*, 75 B.R. at 3 (holding that there is "no debtor-in-possession status of a debtor post-confirmation.")

In *In re Dixon*, the confirmed reorganization plan vested a truth-in-lending cause of action in the trustee. 432 F.2d at 756. Thereafter, both the trustee and the debtor brought truth-in-lending suits after limitations would have normally run. *Id.* The Court expressly held that the tolling provisions of the Code applied to the trustee, but not to the debtor. Accordingly, the trustee's suit was not barred, but the debtor's was. *Id.*

In *In re Craig*, the debtors filed a truth-in-lending cause of action after filing bankruptcy and after the limitations for such a cause of action and would have otherwise expired. 7 B.R. at 865. Thereafter, the bankruptcy case was dismissed without the trustee ever pursuing the cause of action. *Id.* Because the trustee had abandoned the suit, the court held that the debtors could not continue with the suit because section 108(a)'s tolling effect no longer applied. *Id.* at 866.

In none of the cases relied upon by the Besings for the proposition that a debtor post confirmation may rely upon the tolling provisions of section 108(a) was the applicability of section 108(a) actually an issue. These pre-*Cunningham* cases primarily addressed the representation of an attorney for a debtor as opposed to a debtor-in-possession, or concerned the jurisdiction of the bankruptcy court to hear preference cases under sections 547, 548 and 549 of the Code and the debtor's standing to bring such action. In *In re Triangle Chemicals*, 697 F.2d 1280 (5th Cir. 1983), the court addressed the issue of whether a bankruptcy court could approve the employment of attorneys for a debtor-in-possession after the employment had already begun. In holding that the bankruptcy court had discretion to do so, this court held that "there is no distinction between the 'debtor' and the 'debtor-in-possession' . . . *with regard to acts or transactions performed on its behalf* subsequent to the filing of the reorganization petition." *Id.* at 1290. (Emphasis added.)

Likewise, *In re Hargis*, 73 B.R. 622 (Bkrtcy. N.D. Tex. 1987), and *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569 (Bkrtcy. N.D. Tex. 1986), involved the procedures for allowance of attorneys fees in Chapter 11 cases. The application of section 108(a) was not an issue. Interestingly, the court in *In re Chapel Gate* succinctly noted the distinction between a debtor and a debtor-in-possession:

> Under §1107, a debtor is either a debtor-in-possession, and therefore occupies a strictly fiduciary role, or it is not, in which case a trustee administers the estate for the benefit of the creditors. Where no trustee has been appointed in a case under Chapter 11, the terms "debtor" and "debtor-in-possession" though used interchangeably for convenience, are in substance mutually exclusive; an entity can be one or the other but cannot simultaneously occupy both roles.

64 B.R. at 576.

A significant number of the cases relied upon by Petitioners address standing and jurisdiction with regard to causes of action to set aside preferential or fraudulent transfers under sections 547, 548, and 549 of the Code. *See In re Corvettes, Inc.*, 42 B.R. 217 (Bkrtcy. S.D.N.Y. 1984); *In re J.E. Jennings, Inc.*, 46 B.R. 167 (Bkrtcy. Pa. 1985); *In re Chernicky Coal Co., Inc.*, 67 B.R. 828 (Bkrtcy. W.D. Pa. 1986). In *Jennings* and *Corvettes*, the court noted that the standing of a debtor-in-possession or a debtor post-confirmation to bring a preferential transfer cause of action rests entirely on express provisions of a reorganization plan that retains the causes of action and provides that jurisdiction of the bankruptcy court remains over such causes of action. 46 B.R. at 170; 42 B.R. at 222-223. Likewise, *Chernicky* stands with the proposition that a secured creditor may file a section 549 preferential transfer claim if no trustee is available to file the complaint, and if the debtor would somehow be irreparably harmed in connection with other business activities had it filed the claim. 67 B.R. at 832.

Claims for preferential transfers, of course, are created by the Code. Limitations and standing to bring such claims are defined and governed by the Code. Accordingly, a court's interpretation as to whether a debtor may bring such a claim, when the statute expressly provides that the trustee is to

bring a claim, is in no way analogous or related to application of section 108(a)'s tolling provisions to a post-confirmation debtor. The Besing's claims are common law claims brought in state court. None of the cases relied upon by the Besings even remotely suggest that the tolling provision would apply to them after the bankruptcy estate ceases to exist.

The Besings rely most heavily upon *In re Tennessee Wheel and Rubber Co.*, 64 B.R. 721 (Bkrtcy. Tenn. 1986). *Tennessee Wheel* also addressed the debtor's standing to pursue preferential transfer claims. In addressing the defendants' contention that these avoidance actions were not retained by the bankruptcy estate, the court held that:

> This ground is baseless because the reorganized debtor is the statutory successor in interest to the pre-confirmation debtor and the plan of reorganization clearly contemplated retention of jurisdiction by the bankruptcy court to complete the prosecution of these avoidance actions.

64 B.R. at 727. Accordingly, the rationale in *Tennessee Wheel* is consistent with Lynch's position. If a claim is expressly reserved by the reorganization plan, then a debtor post-confirmation may pursue such claim for the benefit of the estate. Unfortunately for the Besings, the Plan did not retain their causes of action against the Appellees.

The Besing's reliance upon *Seawinds Limited v. Nedlloyds Lines, B.V.*, 80 B.R. 181 (N.D. Cal. 1987) is also misplaced. *Seawinds* involved unfair competition claims and application of the Shipping Act of 1984. The court merely held that, based upon the facts of that case, the limitations period provided in the Shipping Act of 1984 applied, and that of section 108(a) did not. Any interpretation of section 108(a) by the court is *dictum* and not binding on any court. Interestingly, the court in *Seawinds* cited section 1107(a) when it stated that section

108(a) applied to debtors as well as trustees. Indeed, the cases relied upon by the court in *Seawinds* in making this *dictum* expressly hold that the tolling provision applies to debtors-in-possession under section 1107(a), not post-confirmation debtors. *See In re Santa Fe Development & Mortgage Corp.*, 16 B.R. 165, 167 n.1 (Bkrtcy. Bank App. Pan., 9th Cir. 1981); *In re T.C.I., Ltd.*, 21 B.R. 876, 878 (Bkrtcy. N.D. Ill. 1982).

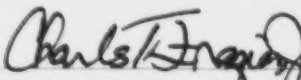
Lynch submits that the Fifth Circuit's holding in *Cunningham* is dispositive and that its progeny should be followed. These cases support Lynch's contention, as well as the holdings of the courts below, that where a debtor fails to retain or reserve a cause of action in its reorganization plan, this cause of action reverts to the debtor who no longer occupies the role of a fiduciary and who is not entitled to the benefits of section 108(a).

C. CONCLUSION

The decision of the Fifth Circuit correctly applies collateral estoppel to the state court judgment holding that Petitioners failed to timely file their legal malpractice suit. The Texas appellate courts are exercising appellate jurisdiction, and not review *de novo* of the state court judgment. Furthermore, the special allocation of jurisdiction rule is inapplicable because the state courts have jurisdiction to determine this incidental bankruptcy issue in a legal malpractice claim. Moreover, as debtors post-confirmation, Petitioners are not entitled to the tolling provision of section 108(a) because their legal malpractice claim was not retained by the bankruptcy estate. Petitioners have wholly failed to establish any error in the Fifth Circuit's disposition of the appeal from the district court. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

COWLES & THOMPSON

BY: 
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